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Supreme Court, U.S.
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No. 07-7

In The

Supreme Court of the United States

A. J. ARAVE,

Petitioner,

v.

MARK HENRY LANKFORD,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

Respondent Mark Lankford and his brother, Bryan, were convicted of felony-murder in separate trials. Lankford's trial counsel submitted, and the trial court gave, three jury instructions regarding the corroboration of an accomplice, one of which conflicted with the other two and Idaho law. Failing to consider a fourth instruction explaining Bryan "was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration," the Ninth Circuit concluded, "a conscientious jury might read instructions 15 and 18 together to state a general rule and its exception." Failing to recognize Lankford was charged with felony-murder and examining Idaho cases instead of the jury instructions as a whole, the Ninth Circuit further concluded the Idaho Supreme Court demands "substantial evidence of corroboration," and that the "only evidence tending to show that Mark was the killer was his brother's word."

1. Because the Ninth Circuit used an incorrect standard in assessing the prejudice prong of *Strickland v. Washington*, and failed to examine the instructions as a whole, did the court err by expanding the number of cases in which collateral relief will be granted and overburdening defense counsel such that the criminal justice system will suffer?

2. Because Lankford was not charged with premeditated murder, the Ninth Circuit used an improper state corroboration standard and since the state provided sufficient evidence to connect Lankford to the robbery, did the Ninth Circuit reduce the standard for ineffective assistance of counsel and destroy principles of comity and federalism by imposing a standard that is contrary to Idaho law?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Attorney General for the State of Idaho, on behalf of A. J. Arave, Warden of the Idaho Maximum Security Institution, respectfully petitions for a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals, which overturned a twenty-two-year-old first-degree murder conviction and death sentence.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit, App. *infra*, at 1-27, is reported at *Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006).

JURISDICTION

The opinion of the Ninth Circuit was filed November 7, 2006. App. at 1. On January 29, 2007, the Ninth Circuit denied Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc. App. at 58. Petitioner requested and received two extensions of time to file his Petition for Writ of Certiorari to and including June 28, 2007. This case arose under 28 U.S.C. § 2254 and Petitioner invokes the jurisdiction conferred on this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment of the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

In June 1983, Lankford and his brother, Bryan, packed their belongings, fled from their home state of Texas because Bryan had violated probation for a robbery conviction and eventually made their way to a forest campground in Idaho County, Idaho, where they camped for several days. App. at 70-71. Retired Marine officer Robert Bravence and his wife, Cheryl, were vacationing in a nearby campground. *Id.* at 71. On July 5, one week after Robert's mother reported her son and his wife missing, the Bravences' van was located at a bus terminal in Los Angeles. *Id.* at 2, 71. Lankford's fingerprints were located in the van and his signature was on credit slips for food and lodging purchased with the Bravences' credit cards. *Id.* at 2. In September 1983, hunters discovered Robert and Cheryl's bodies in a remote area, both having died

from multiple blows to their skulls. *Id.* at 71-72. Lankford's Camaro was found only one-fourth of a mile from the bodies in the same general remote area. *Id.* at 2.

In October, Lankford and Bryan were arrested at a remote campsite in Liberty County, Texas. *Id.* at 71. Numerous items belonging to the Bravences were subsequently found at the site. *Id.* When police interviewed Bryan, he explained both brothers went to the Bravences' campsite:

> Mark came running into the camp and told the man to get on the ground so he did and Mark pulled out a stick like a night stick that a policeman wears but only about a foot long and hit the man on the back of the neck [k]nocking him out he hit the man at least twice and the lady came up a few seconds latter [sic] and Mark told here [sic] to get down on the ground also and she did and then he hit her once I think. . . .

Id. at 3.

Lankford and Bryan were charged with two counts of felony-murder stemming from injuries inflicted when the Bravences were robbed. *Id.* at 71, 164-67. Bryan, who was tried first, agreed to testify for the state against Lankford and told the jury that after reaching the Idaho forest, they hid out and decided to steal a car from someone in the area because Lankford's car payments were delinquent and police would be searching for it. *Id.* at 71. The brothers abandoned Lankford's car in the forest, covered it with brush, and set forth to steal another car. *Id.* Eventually arriving at the Bravences' campsite, Bryan walked into the campsite first with a shotgun draped over his arms and engaged the Bravences in conversation. *Id.* at 71-72. Lankford ran out from behind some bushes where he had

been hiding, ordered Robert to kneel on the ground and hit him on the head with a nightstick. *Id.* at 72. Cheryl, who had gone down to a nearby stream for water, returned and rushed to her husband who was lying on the ground. *Id.* Lankford ordered her to kneel on the ground next to her husband and struck her on the back of the neck with the same nightstick. *Id.*

Lankford did not testify, but in statements to his attorney contended that after the brothers became separated, Bryan returned to the car in the Bravences' van and confessed to striking the Bravences with the shotgun stock. *Id.* at 4. The brothers returned to the Bravences' campsite where Lankford contended he located the two victims with their heads lying in a pool of blood. *Id.* at 5.

The brothers agreed they loaded the two bodies into the van and drove back to their campsite where Lankford hid the bodies near his Camaro, after which they drove the Bravences' van to Oregon and later to California where it was abandoned in Los Angeles, using the Bravences' credit cards to purchase food and accommodations. *Id.*

In preparing for trial, Lankford's attorney, Gregory FitzMaurice, conducted extensive research regarding jury instructions, traveling to the University of Idaho law school library, reviewing California and federal patterned instructions and, after reviewing Idaho law, drafted instructions to submit to the trial court. *Id.* at 12, 42. As a result of his research, FitzMaurice requested three instructions regarding accomplice testimony, which were given by the trial court as instructions 15, 18 and 19. *Id.* at 7-9, 42-44, 150-51. Instruction 15 reads as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily

> and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

App. at 51.

That portion of the instruction stating accomplice testimony "may be received in evidence and considered by the jury, even though not corroborated by other evidence," is contrary to I.C. § 19-2117, which requires corroboration that "tends to connect the defendant with the commission of the offense."

Instructions 18 and 19, also submitted by FitzMaurice, are correct statements of Idaho law. Instruction 18 reads as follows:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

App. at 151. Instruction 19 reads as follows:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact

> related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Id. at 151-52.

Both brothers were convicted of felony-murder and sentenced to death, although the Supreme Court later overturned Bryan's death sentence and he was given a life sentence. *Id.* at 30. Bryan subsequently recanted his trial testimony on several occasions and recanted his recantations. *Id.* at 5. Bryan's latest recantation was in an April 2003 letter to Lankford's appellate attorney where he assumed full responsibility for the murders and contended Lankford was not involved. *Id.* at 6. In a consolidated

appeal, the Idaho Supreme Court affirmed Lankford's conviction, death sentence and the denial of post-conviction relief. *Id.* at 70-106.

Lankford filed a federal habeas petition, which included several ineffective assistance of counsel claims that were initially dismissed because they were not properly presented to the Idaho courts. *Id.* at 6. After the Ninth Circuit's decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), the parties stipulated to remand Lankford's case for further proceedings, resulting in an evidentiary hearing. App. at 6-7, 31-32. Addressing Lankford's contention that FitzMaurice was ineffective for submitting instruction 15, the district court concluded Lankford demonstrated deficient performance but, because of the other instructions, failed to establish that, but for counsel's error, the result of the trial would have been different. *Id.* at 42-46. The court denied relief on all other claims.

Although the court recognized it is a "harder" and "close" question, *id.* at 14, 26, the Ninth Circuit, addressing only Lankford's claim regarding the instructions, reversed the district court's finding of prejudice. Rejecting the state's argument and the district court's conclusion that the instructions as a whole overcome any prejudice stemming from instruction 15, the court concluded, "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception." *Id.* at 15 (emphasis added). Examining whether there was sufficient corroboration, the court examined Idaho cases and opined, "Idaho cases suggest that, where the trial court has refused a corroboration instruction under § 19-2117, the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless." *Id.* at 19. Even though Lankford was charged

with felony-murder and not premeditated murder, the court then concluded, "The only evidence tending to show that **Mark was the killer** was his brother's word." *Id.* at 21 (emphasis added).

REASONS FOR GRANTING THE PETITION

In this habeas proceeding, the Ninth Circuit adopted a standard, not supported by this Court's precedents and in conflict with the rulings of other circuits, that greatly reduces the standard defendants must meet to establish ineffective assistance of counsel claims that are based upon counsel's submission of jury instructions. The Ninth Circuit's conclusion that "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception," and the court's failure to review the instructions as a whole, expands the number of cases in which collateral relief will be granted because of the *de minimus* burden imposed by the court to establish prejudice and results in a standard "so burdensome to defense counsel that the entire criminal justice system suffers as a result." *Strickland v. Washington*, 466 U.S. 668, 697 (1984). Intervention by this Court to prevent such an expansion of the Sixth Amendment right to counsel is required.

The Ninth Circuit also failed to recognize that, because Lankford was charged with felony-murder, under state law the prosecutor was not required to corroborate Lankford's involvement in the murder, but merely his involvement in the underlying felony, robbery. Because the Ninth Circuit also applied an incorrect state law standard for corroboration and failed to determine whether there

was sufficient corroboration of the robbery, the court erred by reversing the district court and granting habeas relief.

A. *Strickland* Prejudice Requires A Reasonable Probability Of A Different Result Based Upon The Instructions As A Whole

To prevail on a claim of ineffective assistance of counsel, Lankford must show his counsel's representation was deficient and that the deficiency was prejudicial. *Strickland*, 466 U.S. at 687. Because Lankford has the burden of establishing both prongs, "a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies." *Id.* at 697.

Prejudice requires that Lankford show "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* at 687. This requires that Lankford demonstrate "a reasonable probability that, but for counsel's unprofessional errors the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694. In making such a determination, a reviewing court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

Determining whether an ineffective assistance of counsel claim based upon jury instructions meets the *Strickland* prejudice standard, the circuits, relying upon *Cupp v. Naughton*, 414 U.S. 141, 147 (1973), have examined the instructions "as a whole." *See e.g., Conner v. McBride*, 375 F.3d 643, 668 (7th Cir. 2004) ("Jury instructions are properly considered in their entirety whether

alleged as the basis for overcoming procedural default, or as the basis for an ineffective assistance of counsel claim"); *Mello v. Dipaulo*, 295 F.3d 137, 150 (1st Cir. 2002) (affirming the state court's examination of the instructions as a whole in denying an ineffective assistance of counsel claim); *Campbell v. Coyle*, 260 F.3d 531, 557 (6th Cir. 2001) (affirming the district court's examination of the instructions as a whole in describing the elements of aggravated murder in denying an ineffective assistance of counsel claim); *United States v. Flynn*, 87 F.3d 996, 1001 (8th Cir. 1996) ("The instructions, taken as a whole, were not incorrect").

The lower courts have also required defendants to meet the standard in *Boyde v. California*, 494 U.S. 370, 380 (1990), "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *See e.g.*, *Jacobs v. Horn*, 395 F.3d 92, 114 (3rd Cir. 2005) ("there is no reasonable likelihood that the outcome of the proceedings would have been any different"); *Peterson v. Murray*, 904 F.2d 882, 889 (4th Cir. 1990) ("we do not think there is a reasonable likelihood that the jury, considering the language in context, would have understood the instructions as placing the burden on Peterson"); *Klvana v. California*, 911 F. Supp. 1288, 1296 (C.D. Cal. 1995) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72 (1991)) ("we inquire whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution").

While the Supreme Court has not determined "whether there is a difference between the 'reasonable likelihood' and 'reasonable probability' standards," *United States v. Gonzalez-Gonzalez*, 258 F.3d 16, 22 (1st Cir.

2001), and the circuits are divided on the question of whether there is a difference, *compare United States v. Steinberg*, 99 F.3d 1486, 1490 (9th Cir. 1996); *United States v. Gonzales*, 90 F.3d 1363, 1368 n.2 (8th Cir. 1996); *United States v. Alzate*, 47 F.3d 1103, 1109-10 (11th Cir. 1995); *Kirkpatrick v. Whiteley*, 992 F.2d 491, 497 (5th Cir. 1993); *United States v. O'Dell*, 805 F.2d 637, 641 (6th Cir. 1986); *United States v. Kluger*, 794 F.2d 1579, 1582 n.4 (10th Cir. 1986); *United States v. Jackson*, 780 F.2d 1305, 1309 (7th Cir. 1986); *but see United States v. Boyd*, 55 F.3d 239, 245 (7th Cir. 1995); *United States v. Sutton*, 542 F.2d 1239, 1242 & n.3 (4th Cir. 1976), even if the standards are the same, a "reasonable probability" is more than a mere "possibility," *see Fields v. Woodford*, 309 F.3d 1095, 1107-08 (9th Cir. 2002) ("This requires showing more than the possibility that he was prejudiced by counsel's errors"). A "reasonable probability" does not require a showing that "counsel's deficient conduct more likely than not altered the outcome in the case," rather, a defendant must show the error "actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 693. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test [citation omitted] and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." *Id.* The Supreme Court has explained that testimony which "**might** have changed the outcome of the trial," does not rise to the level of a "'reasonable probability' that the result of the trial would have been different." *Strickler v. Greene*, 527 U.S. 263, 290 (1999) (emphasis added).

While the Ninth Circuit cited the appropriate standard for determining whether Lankford had established that FitzMaurice's submitted instruction was prejudicial, App. at 14, in its final analysis the court used words that significantly reduced the standard from a reasonable likelihood to a mere possibility or "conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. For example, the court concluded, "[t]he two statements **seem** to be bridged by the last sentence of instruction 15"; "[t]his line **appears** to create an exception"; and, more significantly, "a conscientious jury **might** read instructions 15 and 18 together to state a general rule and its exception." App. at 15 (emphasis added). This is not the appropriate standard upon which prejudice can be found.

The requirement that instructions be examined "as a whole," *Cupp*, 414 U.S. at 147, is consistent with the requirement that ineffective assistance of counsel claims be considered based upon the "totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695. Admittedly, the Ninth Circuit examined all three instructions submitted by FitzMaurice and then concluded the phrase in instruction 15 – "unless you believe that unsupported testimony beyond a reasonable doubt" – "appears to create an exception to instruction 18's warning not to credit uncorroborated testimony." App. at 15. However, because the Ninth Circuit failed to examine all of the instructions "as a whole," the court failed to recognize instruction 20 eliminated any possibility of an exception to instruction 18 by stating:

> If the crime of murder in the first degree was committed by anyone, the witness Bryan Stuart Lankford was an accomplice as a matter of law

> and **his testimony is subject to the rule requiring corroboration.**

App. at 152 (emphasis added).

As recognized by the Ninth Circuit, "there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences." App. at 16. Therefore, the instructions, "as a whole," are not contrary to Idaho law because there was overwhelming evidence that the "crime of murder in the first degree was committed by ['one or both of the Lankford brothers']" and the jury was expressly instructed Bryan "was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration." App. at 152.

Had the Ninth Circuit utilized the correct standard, examined the instructions as a whole and not diminished Lankford's burden, thereby expanding the number of cases in which collateral relief will be granted, Lankford's case would not be "harder" or "close," and the district court would have been affirmed.

B. The Prosecutor Was Required Only To Corroborate Bryan's Testimony That Lankford Was Involved In The Robbery

In determining Lankford established prejudice, the Ninth Circuit reviewed Idaho law regarding corroboration and concluded, "The only physical evidence presented at trial was circumstantial, and all of that evidence also linked Bryan to the murders. The only evidence tending to show that **Mark was the killer** was his brother's word." App. at 21 (emphasis added). Because Lankford was charged with felony-murder and not premeditated murder, Idaho law did not mandate "evidence tending to show that

Mark was the killer," but only that he was "connected with the commission of the [robbery]." *State v. Scroggins*, 716 P.2d 1152, 1158 (Idaho 1986).

As explained by the Idaho Supreme Court, "the proof of a murder in the first degree is established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery. The requirement of 'malice aforethought' is satisfied by the fact the killing was committed in the perpetration of a robbery." App. at 77; *see also Scroggins*, 716 P.2d at 1158 ("In a prosecution for felony-murder, the state is relieved of the burden of proving that a defendant had the specific intent to kill and instead need only prove that all individuals charged as principals had the specific intent to commit the predicate felony").

The jury was expressly instructed regarding these general principles of Idaho law. App. at 154-55. The jury was further instructed, "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime." App. at 158. Finally, the jury was instructed as follows:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetration of the crime aid and abet in its commission, are guilty of murder of the first

> degree, whether the killing is intentional or unintentional.
>
> Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kill a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree.
>
> A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.
>
> However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant can not be convicted of first degree murder.

App. at 160-61.

While the Ninth Circuit examined numerous Idaho cases to conclude, "where the trial court has refused a corroboration instruction under § 19-2117, the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless," App. at 19, the court should not have relied upon prior Idaho cases to determine if sufficient corroboration was presented, but should have relied upon the instructions,

particularly instruction 19, App. at 151-52, which followed the requirement for corroboration under I.C. § 19-2117.

Further, even if Idaho cases are examined, because the trial court did not **refuse** to give a corroboration instruction, but merely gave conflicting instructions, the Ninth Circuit's conclusion, that "the Idaho Supreme Court has demanded substantial evidence of corroboration," is also a misstatement of Idaho law. In *State v. Evans*, 631 P.2d 1220, 1222 (Idaho 1981) (quoting *State v. Gillum*, 228 P. 334, 336 (Idaho 1924)), the Idaho Supreme Court discussed the degree of corroboration necessary to comply with the statute:

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice's testimony which is necessary to warrant a conviction, each case must be governed by its own circumstances, **keeping in view the nature of the crime, the character of the accomplice's testimony, and the general requirement with respect to corroboration.** Where the circumstances point to the guilt of the accused, independent of the accomplice's testimony, such circumstantial evidence may be a sufficient corroboration of the accomplice's testimony to sustain a conviction. It is not necessary that the testimony of an accomplice be corroborated in every detail. **Any corroborative evidence legitimately tending to connect the defendant with the commission of a crime may be sufficient to warrant a conviction, although standing by itself it would not be sufficient proof of defendant's guilt.** (Emphasis added).

In *State v. Garcia*, 630 P.2d 665, 672 (Idaho 1981) (quoting *State v. Bassett*, 385 P.2d 246, 248 (Idaho 1963))

(citations omitted), the Idaho Supreme Court reaffirmed the "applicable standards for determining whether an accomplice's testimony is sufficiently corroborated to satisfy the requirements of I.C. § 19-2117":

> It is not necessary that there be corroborating evidence concerning every material fact as to which the accomplice testified. The statute permits convictions upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroboration be independent of the testimony of the accomplice and connect or tend to connect the defendant with the commission of the crime charged. **Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact. It may be entirely circumstantial.** The jurors are the judges of the weight and credibility of the testimony under proper instructions. (Emphasis added).

"[A]n innocent explanation does not strip the evidence of its corroborative character," *State v. Hill*, 97 P.2d 1014, 1019 (Idaho Ct. App. 2004), and merely because an accomplice's testimony is vital to the state's case does not change the level of corroboration required, *see State v. Jones*, 873 P.2d 122, 126 (Idaho 1994) ("Wystrach's testimony was integral to the prosecution's case, providing first-hand knowledge of the conspiracy, its subject matter and payoffs").

"Keeping in view the nature of the crime," *Evans*, 631 P.2d at 1222, it is logical to examine robbery and felony-murder cases to determine whether Bryan's testimony was sufficiently corroborated. In *State v. Fetterly*, 710 P.2d

1202, 1205 (Idaho 1985), the defendant was charged with both premeditated murder and felony-murder based upon a murder committed during the course of a burglary. Addressing the defendant's challenge to his felony-murder conviction, the court explained the victim's death "was part of a stream of events which began the evening Fetterly and Windsor entered Grammer's home and ended the following day when Grammer's possessions were removed from the home." *Id.* at 1207-08.

In *Evans*, 631 P.2d at 1222, the testimony of a criminalist who testified only that it was possible two hairs taken from a ski mask belonged to the defendant, and the testimony of the victim regarding only the robber's eyes and nose, was sufficient evidence to corroborate an accomplice's testimony. In *State v. Pierce*, 685 P.2d 837, 842 (Idaho 1984), a case similar to Lankford's, the supreme court concluded testimony establishing the defendant was seen with his two accomplices driving the getaway car before the robbery and driving the car more than thirty minutes after the robbery was sufficient to corroborate the testimony of the accomplices.

Based upon Idaho's felony-murder and robbery cases, Bryan's testimony was sufficiently corroborated with more than "the testimony of the state's pathologist, Dr. Robert Cihak." App. at 21. As explained in the prosecutor's closing statement, there was significant evidence supporting Bryan's testimony, particularly "the time sequence" and Lankford's statements to Roy Ralmuto. On the day of the Bravences' murders, at approximately 10:00 a.m., Art Goodloe saw a man and woman near a greenish Volkswagen van. When Goodloe returned at approximately 3:30-4:00 p.m. he saw the two people and van near Sheep Creek campground. That same evening at approximately 6:30

p.m., Darrell Cox picked up Bryan and Lankford who was carrying a shotgun. At Lankford's request, Cox dropped them off at McAllister campground. Chris Damman and his wife Julie corroborated Cox's testimony, explaining they were at McAllister campground when Cox dropped off the Lankfords at approximately 7:30 p.m. The Lankfords "sort of stood around by the car" making Julie "scared" because "[t]hey weren't real clean, and the gun, and the way they stood around, and they had no – there was no other vehicle there. And that sort of – my mom and I sort of wondered why he was letting them off since there was no houses around that area or anything." The brothers were there for approximately 15-20 minutes and then went "down towards the river."

Ernest Wells and Deputy Jon Stroop detailed the distances between the locations, including McAllister and Sheep Creek campgrounds, Summit Flat where the two bodies were recovered, and the location where the Lankfords concealed the Camaro they had driven from Texas. Lee VonBargen explained it took approximately two hours to travel from Summit Flat to Grangeville. Leo Pils testified regarding the distance and time to drive from Grangeville to Pendleton, Oregon. Based upon the time frame, the prosecutor established significant corroboration permitting him to argue, "Now if Mark wasn't there and wasn't involved and Bryan did this all, they would have had to make a reservation to have Mark have Bryan pick Mark up. I suggest and submit to you . . . that is absolutely unreasonable."

Lankford's finger and palm prints taken from various items inside the Bravences' van further corroborate Bryan's testimony that his brother was involved in the robbery.

Additionally, Ralmuto testified regarding a conversation with Lankford after Lankford returned to Texas. Lankford said, "We've got to get out of here and get out of here now." When Ralmuto left Lankford at the Trinity River, Lankford came to Ralmuto, shook his hand and said, "I would never see him alive again nor Bryan alive again. And, then, he sort of waited a minute, and he said: Well, you might see Bryan alive again, but I can promise you you won't see me alive again." As explained by the prosecutor, "Is that the kind of comment that someone who had only been involved in the use of the credit cards and possession of the stolen property would make? Is that a situation where you'd go back in the brush and spend the rest of your life? I submit not."

Finally, Bryan did not commit the robbery and murders alone. Robert, a retired marine, "was physically in very good shape." Based upon Bryan's stature, Robert's physical condition and desire to protect his young wife, it is unreasonable to believe Bryan's subsequent stories regarding how he allegedly robbed and murdered the Bravences without his brother's assistance.

Based upon all the evidence and a correct standard of Idaho law, the state connected Lankford to the robbery. Because sufficient corroboration was presented to the jury regarding his involvement in the robbery, Lankford failed to establish, based upon a reasonable probability, that the outcome of his trial would have been different if FitzMaurice had not submitted the erroneous instruction.

By requiring the prosecutor to corroborate Bryan's testimony that Lankford "was the killer" and then applying an incorrect state standard requiring "substantial evidence of corroboration," the Ninth Circuit drastically

reduced the standard for ineffective assistance of counsel and destroyed principles of comity and federalism, in violation of this Court's precedents, by imposing a standard that is contrary to Idaho law.

CONCLUSION

Petitioner respectfully requests that a writ of certiorari be granted and the judgment of the Ninth Circuit Court of Appeals be reversed.

Respectfully submitted,

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468 F.3d 578

United States Court of Appeals,
Ninth Circuit.
Mark Henry LANKFORD, Petitioner-Appellant,
v.
Arvon J. ARAVE, Warden, Idaho State Correctional Institution, Respondent-Appellee.
No. 99-99015.

Argued Nov. 15, 2005.
Submitted Oct. 30, 2006.
Filed Nov. 7, 2006.

Andrew Parnes, Ketchum, ID, Charles F. Peterson, Boise, ID, for the appellant.

LaMont Anderson, Deputy Attorney General, Boise, ID, for the appellee.

Appeal from the United States District Court for the District of Idaho; Wm. Fremming Nielsen, Senior District Judge, Presiding. D.C. No. CV-92-00321-S-WFN.

Before: REINHARDT, W. FLETCHER, and BYBEE, Circuit Judges.

BYBEE, Circuit Judge:

In this pre-AEDPA case, we are called upon to review counsel's performance in a twenty-two year old capital murder trial. Finding that the record is clear that counsel requested critical jury instructions that were correct under federal law but clearly in error under Idaho law and that the error was not harmless, we reverse the judgment of the district court and grant the writ.

I. FACTS AND PROCEEDINGS

Robert and Cheryl Bravence were reported missing when they failed to arrive at a relative's house following an extended camping trip in the summer of 1983. One week later, officials discovered their van abandoned at a Los Angeles bus terminal. In September, hunters found the couple's remains in a remote Idaho campground, not far from their last known campsite. The skulls of both were badly damaged, indicating they had died of blunt trauma to the head.

Two brothers, Mark and Bryan Lankford, were arrested for the murders. Investigators found Mark's car about a quarter of a mile from the victims' bodies and his handwriting on credit slips for food and lodging purchased with the victims' stolen credit cards. Investigators found both brothers' fingerprints in the Bravences' abandoned van, and they found Mr. Bravence's knife -- with Bryan's initials newly carved into the scabbard – in Bryan's possession.

The brothers were convicted, in separate trials, and sentenced to death on the same day. Bryan's sentence was overturned on appeal based on the sentencing agreement he received in return for his testimony against Mark.[1] Although there was strong circumstantial evidence connecting the Lankfords to the murders, there were no witnesses to the crime, and no murder weapon was discovered. Bryan's testimony was critical to establishing the government's theory that Mark actually killed the

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[1] Under cross examination, Bryan admitted at trial that he expected to receive an indeterminate life sentence in return for his testimony.

Bravences. At Mark's trial, the state relied heavily on Bryan's uncorroborated eyewitness testimony that Mark committed the murders, beating the Bravences to death with a small club or nightstick. When interviewed by police, Bryan claimed that both brothers went to the campsite. While Bryan engaged the campers in conversation,

> Mark came running in to the camp and told the man to get down on the ground so he did and Mark pulled out a stick like a night stick that a policeman wears but only about a foot long and hit the man on the back of the neck [k]nocking him out he hit the man at least twice and the lady came up a few seconds latter [sic] and Mark told here [sic] to get down on the ground also and she did and then he hit her once I think. . . .

At Mark's trial, Bryan claimed Mark hit Robert Bravence "twice. It could have been once." At his own trial, Bryan described one blow and added, "I think he struck the man another time." He said the blows were aimed "both times in the back of the neck actually. Not in the head. Kind of across, you know, across the neck in the back." He testified that Mark then struck Cheryl, also "across the back of the neck," "one time as I can remember," "only once. . . . [I]t could have been more. I don't know." Although Bryan admitted that his emotions might have interfered with his perception, in both his trial and in Mark's trial he maintained that Mark hit the couple in the back of the neck, striking Robert twice and Cheryl once. Throughout the two trials, and in statements to investigators, Bryan described the murder weapon variously as possibly a "pipe," "sort of a nightstick" made of wood, "a little limb deal," and a "little club" only twelve inches long. Investigators found a nightstick in Mark's abandoned car, but could

not tie it to the murders and did not introduce it into evidence.

Mark did not testify at either trial, but he maintained (in statements to his attorney and to the police) that Bryan had confessed to committing the murders and enlisted his help to hide the bodies. Mark claimed that Bryan went to the couple's camp while the brothers were separated and attacked the campers, crushing their skulls with a large rock. Mark said the brothers had traveled from Texas to Idaho because Mark was trying to get away from what he perceived to be his "materialistic" life in Texas, while Bryan wanted to escape an impending arrest for parole violations. They camped in Idaho at a remote site near Grangeville. After Bryan decided he wanted to return to Texas, Mark left Bryan to hitchhike his way into town. He gave Bryan fifty dollars, told him not to do anything "stupid," and started walking back to the campsite. Before he reached the site some miles away, Bryan drove up in the stolen van. He initially refused to tell Mark how he stole the van, exclaiming "I got it. That's what counts" and complaining "what are all these questions, I told you, don't worry about it!" Finally after several questions, Bryan told Mark about his attack on the Bravences, claiming he hit Robert "in the head with my shotgun stock. I didn't hit him too hard, just to knock him out. I pinched his leg and he didn't move so I thought he was out of it." When Cheryl appeared, he struck her, too "but not as hard. She was out like a light." Mark insisted the two return to the Bravences' camp, telling Bryan "[I]t's not too late to save your ass, maybe." As the two neared the site, Bryan grew increasingly nervous. According to Mark, "[Bryan's] driving was getting reckless and he was chain-smoking the entire time." "The closer we got to the

place, the more nervous [Bryan] became." At the site, Mark immediately spotted the two figures, each lying with its head in a pool of blood. He checked for pulses and told Bryan "they're both dead." Bryan replied "Are you sure?" "They can't be!" Mark then confronted Bryan: "shotgun butt? Tell me the truth." "It was just like I said," Bryan explained,

> But after I hit the woman, the man started trying to get up, so I hit him again. He went down, but was still moving a little. I hit him again, but he wouldn't knock out. So I saw this rock, I picked it up and dropped it on his head twice. He stopped moving. I picked it (rock) up again and hit the woman.

After Bryan and his brother were convicted in 1984, Bryan recanted his testimony against Mark on multiple occasions. He also recanted his recantations. In a conversation with a newspaper reporter, in a written statement after his own sentencing, and again at a hearing on Mark's second motion to reopen, Bryan admitted responsibility for the murders, claiming he killed the Bravences with a rock. Bryan contacted a local reporter in June of 1984, after the brothers had been convicted, but before either was sentenced. In October of 1984, at a hearing on Mark's first motion for a new trial, the reporter testified that Bryan telephoned him to confess, saying he "[w]anted the truth to come out," and admitting that he killed the Bravences by knocking Mr. Bravence unconscious with a stick and then beating them both with a rock. In this version of Bryan's story, Mark was not on the scene. Bryan also testified at Mark's hearing, admitting to the confession but claiming it was a lie that Mark directed him to make so

"he would get out, therefore, they would have to let me out."

Later, in 1985, Bryan wrote a letter to Mark's counsel again accepting full responsibility. This prompted a subsequent hearing on Mark's second motion for a new trial. This time Bryan testified that he entered the Bravences' camp alone, carrying a 12-gauge shotgun, and ordered the couple to lie down. He crushed their skulls with "a rock, a large boulder" that was "about a foot in diameter [and] probably weighed about thirty-five or forty pounds or more." He struck each camper three or four times, and then walked back to the road to enlist Mark's help in hiding the bodies. Bryan described the Bravences' campground and his attack on the campers in detail, and admitted that his earlier testimony against Mark was an attempt to "save [him]self." The court denied Mark's motions for a new trial. In 1998, while he was awaiting resentencing, Bryan again contacted Mark's counsel, asking to speak with him. Bryan's lawyer objected to the proposed interview, threatening to withdraw if Bryan insisted upon meeting with Mark's attorney. As late as April 2003 in a letter to Mark's appellate counsel, Bryan continued to assume full responsibility, confessing that he struck both the Bravences "several times" with "a head size rock."

Mark pursued his state appeals, post-conviction relief, and state habeas relief, then (after several false starts) he filed a federal habeas petition. His ineffective assistance claims were initially dismissed because they had not been properly presented to the Idaho courts. However, the parties stipulated to an evidentiary hearing on Sixth Amendment claims after we ruled in *Hoffman v. Arave,* 236 F.3d 523 (9th Cir.2001), that Idaho procedural rules

for state habeas claims "frustrate[d] [prisoners'] exercise of a federal right" and were "inadequate to preclude federal [review]." *Id.* at 531 (internal quotation marks omitted).

Among the grounds raised in his state and federal habeas proceedings, Mark contended that ineffective assistance from his trial counsel, Gregory FitzMaurice, deprived him of his Sixth Amendment right to counsel. Mark argued that FitzMaurice failed to consult with an independent forensic pathologist, which would have shown the weaknesses in the state's theory that Mark committed the murders; that FitzMaurice failed to impeach Bryan's testimony concerning the murder weapon; and that FitzMaurice requested an erroneous jury instruction that reduced the state's burden to provide corroborating evidence. The district court concluded that as to the forensic evidence, FitzMaurice made a "reasonable strategic decision" to present an alibi defense. The district court also concluded that FitzMaurice did impeach Bryan. Finally, with respect to the jury instruction, the district court found that FitzMaurice's requested jury instruction was erroneous and that his performance in this regard was deficient. The court concluded, however, that Mark did not suffer prejudice as a result.

FitzMaurice requested and received the following instruction on accomplice testimony, cited in the record as instruction number 15:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received

> in evidence and considered by the jury, *even though not corroborated by other evidence,* and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

(emphasis added).

FitzMaurice also submitted two additional instructions which contradicted instruction 15 by requiring that the jury find corroboration before accepting any accomplice testimony. Instruction 18 read:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

Instruction 19 provided:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Mark claims that the instructions were not only inconsistent, but that instruction 15 is an incorrect statement of Idaho law. After three days of testimony, the district court held that the instruction was in error and found that FitzMaurice was ineffective in offering the erroneous instruction. The court also found FitzMaurice deficient in failing to research and present mitigating evidence at Mark's sentencing. However, the court ultimately denied the petition, finding there was no prejudice.

II. STANDARD OF REVIEW

Lankford's petition predates the Antiterrorism and Effective Death Penalty Act (AEDPA) and is therefore not governed by it. We review the district court's denial of the petition de novo. *Turner v. Calderon,* 281 F.3d 851, 864 (9th Cir.2002). Because ineffective assistance of counsel is a mixed question of law and fact, we review this claim de novo. *See Silva v. Woodford,* 279 F.3d 825, 835 (9th

Cir.2002). We review factual determinations for clear error. *Id.*

III. ANALYSIS

Under *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), Lankford may only prevail in his claim of ineffective assistance of counsel if he can show deficient representation "so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." He must also show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* These two elements of *Strickland* are generally referred to as the "performance" and "prejudice" prongs. We evaluate each in turn.

A

As we review FitzMaurice's performance, we must refrain from second-guessing his strategies and acknowledge the "wide range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. Nevertheless, we must hold FitzMaurice to his "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." *Id.* at 688, 104 S.Ct. 2052. Even considering "conduct from counsel's perspective at the time," in at least one respect, FitzMaurice's representation falls below the standard of "reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052. We agree with the district court that there was no reasonable tactical advantage in requiring an erroneous jury instruction that would

allow the jury to give greater weight to Bryan's testimony.[2] In this case, "[c]ounsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another. They were the result of a misunderstanding of the law." *United States v. Span,* 75 F.3d 1383, 1390 (9th Cir.1996).

The error in the instructions requested by FitzMaurice is obvious. Instruction 15 left out a critical element of Idaho law controlling the use of accomplice testimony: the requirement of corroboration. Idaho law provides:

> A conviction cannot be had on the testimony of an accomplice, *unless he is corroborated by other evidence,* which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

IDAHO CODE § 19-2117 (2005) (emphasis added). As the Idaho Supreme Court has explained, "'[the] statute . . . absolutely prohibits a conviction in a criminal case upon the uncorroborated testimony of an accomplice, even

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[2] In the evidentiary hearing in district court, the state attempted to characterize FitzMaurice's selection of the instruction as a tactical move, arguing that there was sufficient corroboration and that the jury would not be able to find Bryan credible beyond a reasonable doubt without corroborating evidence. FitzMaurice could not confirm the theory, explaining "I can't tell you at this point in time . . . my motivations of asking [for] that jury instruction. That appears to be a plausible reason, but I can't tell you honestly that was my reason at the time." Even if FitzMaurice did introduce the instruction in order to draw attention to Bryan's credibility, a general instruction on reasonable doubt could have served the same purpose without eliminating the corroboration requirement.

although [sic] the jury may believe such testimony to be entirely true, and that it establishes the defendant's guilt beyond a reasonable doubt.'" *State v. Emmons,* 94 Idaho 605, 495 P.2d 11, 15 (1972) (quoting *State v. Carr,* 28 Or. 389, 42 P. 215, 216 (1895) (evaluating a statute that the *Emmons* court deemed "essentially the same as I.C. § 19-2117")).

The Idaho statute reflects the state's unwillingness to hand down convictions based solely on accomplice testimony. As the court in *Emmons* observed:

> [T]he criminal law has shown the sources of such testimony to be generally so corrupt as to render it unworthy of belief, and that it is therefore better as a matter of public policy to forbid a conviction on the uncorroborated testimony of an accomplice, although the guilty may thereby sometimes escape punishment, than to leave it possible for the conviction of an innocent person on such testimony.

Id. (quoting *Carr,* 42 P. at 216); *see id.* ("We concur with the reasoning of the Oregon Supreme Court. . . ."). The Idaho Court of Appeals has explained that "[t]his statutory corroboration requirement is intended to protect against the danger that an accomplice may wholly fabricate testimony, incriminating an innocent defendant in order to win more favorable treatment for the accomplice." *Matthews v. State,* 136 Idaho 46, 28 P.3d 387, 390 (2001).

FitzMaurice explained that he performed his research at the library of the University of Idaho Law School, that there were no model instructions for Idaho at the time, and it seems that he took the instruction from a collection of federal instructions. In this, FitzMaurice was dutiful, conscientious – and quite in error. Federal law permits

bare accomplice testimony, while Idaho expressly forbids it. *Compare Emmons*, 495 P.2d at 15, *and State v. Gillum*, 39 Idaho 457, 228 P. 334, 334 (1924), *with Darden v. United States*, 405 F.2d 1054, 1056 (9th Cir.1969) (noting that "a conviction in federal court may be based on the uncorroborated testimony of an accomplice"). FitzMaurice simply overlooked important differences between Idaho law and federal law. It was a young lawyer's mistake, akin to failing to check the pocket part, but it was a mistake, plainly enough. As the district court noted, "[s]imply reviewing the three instructions would have revealed that two instructions . . . conformed with Idaho's law regarding accomplice testimony, while [the third] was substantially different, as well as not being in conformance with Idaho law."

FitzMaurice's error is perhaps understandable, given his limited experience and resources,[3] but it is constitutionally inexcusable. By inviting a jury instruction that misstated state law and made it *easier* for the jury to convict his client, counsel unwittingly undermined the very "adversarial testing process" he was supposed to protect. *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052. We agree with the district court that in this regard his performance fell below the "range of reasonable professional assistance." *Id.* at 689, 104 S.Ct. 2052.

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[3] FitzMaurice was a part-time public defender who had, it seems, only tried one previous major felony: a case of cattle-rustling. He had never defended a murder case, and had no training in capital defense. He delivered no opening statement to the jury, and called no witnesses. He did not secure a second attorney, an investigator (except for a fingerprint analyst), an independent pathologist, or an independent psychologist to aid in preparing a defense.

B

Whether the erroneous instruction rendered the ultimate verdict in this case unreliable is a harder question. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693, 104 S.Ct. 2052. To reverse we must find a "reasonable probability that . . . the result of the proceeding would have been different" had the erroneous instruction not been given. *Id.* at 694, 104 S.Ct. 2052; *see also Span,* 75 F.3d at 1390. And we must consider the instructions "as a whole" in evaluating the magnitude of the error. *Middleton v. McNeil,* 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde v. California,* 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (internal quotation marks omitted); *see also Estelle v. McGuire,* 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Accordingly, Mark need not establish error for certain. "[A] defendant need not establish that the jury was more likely than not to have been impermissibly [influenced] by the instruction." *Boyde,* 494 U.S. at 380, 110 S.Ct. 1190. "If the charge as a whole is ambiguous, the question is whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in [an impermissible] way. . . ." *Middleton,* 541 U.S. at 437, 124 S.Ct. 1830 (internal quotation marks omitted) (emphasis added).

The government argues that any error was cured because there were additional, proper instructions (instructions 18 and 19) that arguably contradicted instruction 15. Instruction 18 stated that "a defendant *cannot* be found guilty based upon the testimony of an accomplice

unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense." (emphasis added). Instruction 19 defined "corroboration" and instructed the jury to "assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense."

When instructions 15 and 18 are read together they can be reconciled, but not in a way that is helpful to the state. Instruction 18 plainly states that "a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence." That, of course, contradicts instruction 15 which states that an accomplice's testimony "may be received in evidence and considered by the jury, even though not corroborated by other evidence." The two statements seem to be bridged by the last sentence of instruction 15: "You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt." This line *appears* to create an exception to instruction 18's warning not to credit uncorroborated testimony: The testimony can be credited if the jury believes it beyond a reasonable doubt. To the trained legal eye, the "beyond a reasonable doubt" adds nothing to instruction 15 because a criminal jury generally must find proof beyond a reasonable doubt to return a guilty verdict. *See Cool v. United States,* 409 U.S. 100, 104, 93 S.Ct. 354, 34 L.Ed.2d 335 (1972); *In re Winship,* 397 U.S. 358, 362, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Nevertheless, a conscientious jury might read instructions 15 and 18 together to state a general rule and its exception: A defendant cannot be

found guilty based upon the testimony of an accomplice unless either (a) such testimony is corroborated by other evidence, *or* (b) the jury believes the unsupported testimony beyond a reasonable doubt. The instructions, thus reconciled, remain contrary to Idaho law. Accordingly, the jury could have convicted Lankford *either* because they found Bryan's testimony to be adequately supported,[4] *or* because they believed his uncorroborated testimony beyond a reasonable doubt. "[W]hen a case is submitted to the jury on alternative theories the [impermissible legal error in] any of the theories requires that the conviction be set aside." *Leary v. United States,* 395 U.S. 6, 31-32, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *see also Griffin v. United States,* 502 U.S. 46, 59, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991) ("[T]he term 'legal error' means a mistake about the law, as opposed to a mistake concerning the weight or the factual import of the evidence.").

It is hard to imagine a case in which such an instructional error could have caused more damage. Erroneous instruction 15 went to the heart of the case. Although there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences, *only* Bryan's testimony singled out Mark as the killer. There were no witnesses to the murder, and no murder weapon was admitted into evidence. There was no forensic or circumstantial evidence suggesting that Mark, rather than

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[4] There is another possibility, also not helpful to the state. The jury could have read instruction 15 to mean that they could convict Mark on Bryan's unsupported testimony if they believed Bryan beyond a reasonable doubt. *Or,* they could convict Mark even if they did not believe Bryan beyond a reasonable doubt so long as there was some evidence to corroborate his testimony. This latter possibility would, of course, flatly violate *In re Winship.*

Bryan, beat the victims to death. Bryan's testimony was vital to the prosecution, and instruction 15 allowed the jury to convict Mark on Bryan's word alone, in obvious violation of Idaho law. Moreover, Bryan had every incentive to lie: If Mark did not kill the Bravences, then Bryan must have done the deed. Additionally, Bryan thought he had a deal to avoid the death penalty in exchange for his testimony against his brother. *See Lankford v. Idaho,* 500 U.S. 110, 120-121, 111 S.Ct. 1723, 114 L.Ed.2d 173 (1991); *State v. Lankford,* 127 Idaho 608, 903 P.2d 1305, 1309 (1995). This is precisely the declared purpose for Idaho's corroboration requirement: "to offset the danger that an accomplice may wholly fabricate testimony, inculpating an innocent person, in order to purchase immunity from prosecution, or lenient treatment, for his own complicity in the crime." *State v. Pierce,* 107 Idaho 96, 685 P.2d 837, 842 (Ct.App.1984) (citations omitted).

Considering the instruction "in the context of the instructions as a whole and the trial record" does not inspire confidence in the reliability of Mark's verdict. *Estelle,* 502 U.S. at 72, 112 S.Ct. 475. The state nonetheless attempts to salvage Mark's conviction by relying on Idaho law, which provides that "[a]n error in failing to give [a corroboration] instruction may be harmless if ample corroborative evidence was presented." *State v. Hill,* 140 Idaho 625, 97 P.3d 1014, 1019 (Ct.App.2004). The state contends that the prosecution presented corroboration adequate to meet the requirements of Idaho Code § 19-2117.

The Idaho Supreme Court has explained in general terms what corroborating evidence is required by § 19-2117:

> The statute permits convictions upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroborative evidence must be independent of the testimony of the accomplice and connect or tend to connect the defendant with the commission of the crime charged. Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact. It may be entirely circumstantial. The jurors are the judges of the weight and credibility of the testimony under proper instructions.

State v. Garcia, 102 Idaho 378, 630 P.2d 665, 672 (1981) (quoting *State v. Bassett,* 86 Idaho 277, 385 P.2d 246, 248 (1963)) (citations omitted). Idaho courts have also explained that:

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice's testimony which is necessary to warrant a conviction; each case must be governed by its own circumstances, keeping in view the nature of the crime, the character of the accomplice's testimony, and the general requirements with respect to corroboration.

Gillum, 228 P. at 336. We note that most of the Idaho cases addressing the statute arose as claims disputing the sufficiency of the evidence, not in the context of an erroneous instruction, and in sufficiency cases "[the c]ourt will construe all of the evidence in favor of upholding the verdict." *Hill,* 97 P.3d at 1018. In such cases, the court must uphold the jurors' verdict if there is any basis for a finding of corroboration because they are "the judges of the

weight and credibility of the testimony *under proper instructions.*" *Garcia,* 630 P.2d at 672 (emphasis added) (quoting *Bassett,* 385 P.2d at 248); *see also State v. Gonzales,* 92 Idaho 152, 438 P.2d 897, 901 (1968).

The error here is a more fundamental one. The jury was instructed to overlook the question of corroboration, and we must ask whether, given proper instructions, there is a "reasonable probability" that the jury would have found Bryan's testimony unsupported. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052. The Idaho cases suggest that, where the trial court has refused a corroboration instruction under § 19-2117, the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless. In *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1985), the Idaho Supreme Court found that the trial court committed harmless error when it omitted the corroboration instruction in a felony murder conviction where Scroggins "admitted that he assisted [the accomplice] in taking the victim to the creek, that he, Scroggins, had handcuffed the victim, that [the accomplice] had used Scroggins' knife, that he, Scroggins, had attempted to rape the victim and that he had been in the vicinity when [the accomplice] had, in fact, raped and murdered the victim." *Id.* at 1158. The Court concluded that "although Scroggins' testimony did not corroborate [the accomplice's] *version* of the facts, it was sufficient to permit a finding that Scroggins was connected with the commission of the offense." *Id.* In *Matthews v. State,* 136 Idaho 46, 28 P.3d 387 (Ct.App.2001), Matthews sought post-conviction relief from his conviction for first degree murder. *Id.* at 389-90. Matthews argued that his counsel was ineffective because

he failed to request a jury instruction on corroboration of accomplice testimony. The court concluded that the jury should have been instructed, but it found the error was harmless. Matthews had admitted that he joined four other juveniles in beating the victim; testimony from other witnesses also corroborated the testimony from Matthews's accomplices. In this case, "the outcome of the trial would [not] have been different had Matthews's counsel requested a jury instruction regarding the corroboration of accomplice testimony." *Id.* at 391-92.

These cases, in which there was substantial corroborating evidence, contrast with the Idaho Supreme Court's decision in *State v. Gonzales,* 92 Idaho 152, 438 P.2d 897 (1968). In that case, the Idaho Supreme Court held that failure to give the corroborating evidence instruction was not harmless even though the evidence included witnesses who saw the defendant fight with the victim before the murder and who recognized the defendant's car at the subsequent drive-by shooting. *Id.* at 899, 901. Investigators found a spent cartridge at the defendant's house and a rifle at his mother's apartment. *Id.* at 900. The defendant allegedly asked police at his booking, "How is the fellow I shot, is he ded [sic] or what?" *Id.* at 899. Even with all of this evidence, the Court reversed the conviction because the testimony of an accomplice (a passenger in the car) was not properly limited with a corroboration instruction. "[T]he [trial] court had a duty to instruct the jury on all matters of law necessary for their information," the Court explained, "and the defendant was entitled to have his theory of the case submitted to the jury upon *proper* instructions." *Id.* at 901.

The nature of the evidence sufficient to corroborate is further explained in *State v. Campbell,* 114 Idaho 367, 757

P.2d 230 (Ct.App.1988). In that case, Campbell was accused of kidnaping and murder. *Id.* at 231. He argued that there was insufficient evidence to corroborate the testimony of his two accomplices, who testified that Campbell had repeatedly kicked the victim. The state introduced a pathologist who testified that the victims injuries were consistent with the testimony of the accomplices. The Idaho Court of Appeals held that this was not sufficient:

> Without any question, the autopsy corroborated the accomplices' testimony describing the infliction of severe injuries on Atwood. However, under I.C. § 19-2117, evidence that is merely corroborative of the "commission of the offense, or the circumstances thereof" is not enough. Instead, the evidence necessary to serve as corroboration of the accomplice's testimony must tend "to connect the defendant with the commission of the offense."

Id. at 232-33. Although the pathologist's report was not sufficient corroboration, the court found sufficient corroboration in other evidence, including statements that Campbell made to others. *Id.* at 233-34.

The corroborative evidence the state points to in this case – including, principally, the testimony of the state's pathologist, Dr. Robert Cihak – implicates the Lankfords generally, not Mark specifically. There is no evidence that uniquely points to Mark as the perpetrator. All of the state's evidence equally implicates Bryan. The only physical evidence presented at trial was circumstantial, and all of that evidence also linked Bryan to the murders. The only evidence tending to show that Mark was the killer was his brother's word. We conclude there is a "reasonable probability" that, with proper instructions on the question

of corroboration, the jury would not have convicted Mark of first degree murder. *Strickland,* 466 U.S. at 694, 104 S.Ct. 2052.

We find FitzMaurice's error in drafting jury instructions an adequate grounds for reversal. Although we do not reach the other grounds on which Mark contends that FitzMaurice rendered ineffective assistance of counsel, the evidence Mark has presented in support of those claims reinforces our judgment that Mark was prejudiced in this case. At the federal evidentiary hearing, Mark presented experts who questioned the reasonableness of FitzMaurice's failure to hire an independent forensics expert to investigate Mark's claim that Bryan beat the Bravences with a large river rock. The testimony of Dr. Todd Grey, forensic pathologist and chief medical examiner for the state of Utah, strongly suggests that an independent forensic investigation would have revealed serious flaws in Bryan's story that Mark beat the Bravences with a stick. He pointed out that the "extensive fragmentation" of the victim's skulls suggests the couple were bludgeoned with a larger object, such as the river rock Mark described. He described Cheryl Bravence's skull as "a pile of bones" before it was reconstructed by forensics experts, and explained that her skull showed multiple linear and branching fractures. In at least one area, parts of the bone were missing where bone had been broken off and driven downwards into her brain. Robert Bravence's skull also required reconstruction, and it had to be reinforced with clay where sections of bone were missing. Because the Bravences' skulls showed "extensive fracturing," "depression of bone," and "fragmentation" on virtually all sides, Dr. Grey concluded that their injuries were "much more consistent with the scenario in which these individuals

were struck with the large rock." To cause this level of destruction with a twelve-inch stick, the expert testified, "would take a tremendous amount of force," "an horrendous amount of force." "I am not saying it is impossible," Dr. Grey explained, "but it would certainly take a lot of effort." Although Bryan claimed Mark dealt Robert a "hard blow" that necessarily dislodged portions of his skull, Bryan testified at his own trial that there were no sounds "such as bones breaking" and that there was no blood. The single skull-crushing strike that killed Cheryl was apparently also silent and bloodless. Bryan certainly did not describe a clubbing that used "an horrendous amount of force."

Dr. Grey's testimony not only cast doubt on the identity of the murder weapon and the amount of force employed, it clearly showed that the victims must have endured multiple blows. Bryan's description of a quick, three-strike attack did not fit the physical evidence. It was more likely that the victims were struck several times than that they were each hit once or twice (as Bryan maintained), because skulls were not only severely fractured and fragmented, but sustained damage on nearly every side, suggesting blows from various angles. Cheryl Bravence's skull showed fractures on the top and back of the skull, breaks near the right ear, and fractures in the left temple – hardly the work of a single silent strike to the neck. Her husband's skull sustained fractures at the back and top of the head, was missing parts of bone from the left side, and suffered breaks in the left eye socket, right brow, and left jaw. A fracture also separated his alveolar plate – a portion of bone that supports the upper teeth. "To inflict the extent of damage that I see in this skull with three blows is pretty far beyond the pale of what I would

expect to be able to see," Dr. Grey explained. "I can't see how that pattern would be produced by a stick with that scenario [of three blows] that you described, even with as much force as you could possibly muster, I don't see how you could get that pattern." On cross examination, Dr. Grey admitted that the injuries he observed could have been caused by as few as three blows to Cheryl and four to Robert – making seven strikes altogether – but more blows would likely be needed. In addition, he explained that Bryan's description of the location of the blows did not match the physical evidence. The extensive injuries on both sides of the skulls could not have been produced during the attack Bryan described, where an assailant struck the victims only "in the back of the neck. . . . Not in the head."

Had Dr. Grey been asked to serve as an advisor in a trial that presented this sort of forensic evidence, he would have advised the attorney cross examining Bryan to "get [a] detailed . . . description of how the blows were inflicted, the number of blows, what kind of a swing was used, what the implement, the stick, was like, [and whether] it appear[ed] to be weighted or unweighted" so that the testimony could be tested against the pattern of injury. Dr. Grey affirmed that his type of questioning, together with detailed questioning of an expert pathologist, was "the sort of thing you customarily do when you are retained to work a case." Dr. Grey did not disagree with Dr. Cihak's testimony at trial that the injury was the result of blunt trauma that could have been caused by a pipe, nightstick, rock, or a gun. The problem was that Dr. Cihak was never "really pinned down on what [wa]s more likely given the pattern of injury." "He never was asked to say among those choices what, seeing this pattern of injury, what seems

more likely. . . . " By testifying to injuries caused by blunt trauma, Dr. Cihak merely affirmed "[a] myriad of possibilities" as to the murder weapon.

The forensic evidence, considered in light of Idaho's corroborative requirement, underscores the inconsistencies in Bryan's story. Bryan wavered in his physical description of the weapon and its origin. He described the murder weapon in ambiguous terms as a "sort of nightstick" made of wood, "a little limb deal" and a "little club" twelve inches long. In an interview with the sheriff, he had trouble remembering specifics about the stick. It "could have been" a piece of pipe, but Bryan did not know "for sure." When asked whether the weapon was a foot long, he said "umm, probably about, yeah, probably about a foot and a half, maybe." His descriptions changed over the course of the investigation. In another of his initial statements, given to police, he claimed that the weapon was "a stick like a night stick that a policeman wears but only about a foot long." He told an FBI investigator that it was "a 'night stick' like a policeman uses. [Mark] had the 'night stick' for a long time and carried it in his car." On direct examination at his own trial, Bryan said the weapon was "a thing about a foot long, which is a little club that he has had for a long time." He claimed he "d[id]n't know where [Mark] got it from. . . . Probably bought it somewhere." Later, at Mark's trial, Bryan remembered the weapon's appearance and history clearly. It was "a sort of a night stick, in a way. . . . It's about a foot long, reddish brown wood. I think it, I believe it came from me. I believe my wife – my ex-wife gave it to me, and I gave it to Mark a long time ago."

At his trial, Bryan claimed that he did not know Mark was carrying the club when the two entered the Bravences'

camp. "I never saw the club," he claimed, explaining that it was so small it could "[v]ery easily" have been concealed in a pocket. He also said he had not seen the little club since the killings. It could have been at the Bravences' camp site, he explained, or it could be at the spot where the bodies were unloaded or the place they were ultimately hidden. "I'm sure it would be in one of the three places," he told the court. Mark did in fact carry a nightstick, and it was recovered. Police described it as a wooden nightstick, dark brown or black in color, about eighteen inches long. The stick was not found at the murder site, on the road, or at the Bravences' grave site. It was found in Mark's abandoned car. The nightstick the police found in Mark's car would, of course, have been powerful corroboration of Bryan's testimony, but the state – to its credit – declined to introduce it into evidence because it could not be linked to the killings.[5]

In sum, Bryan's testimony about the murder weapon, the number of blows, and the force of those blows was vague, contradictory, and – when considered in light of the Bravences' fragmented skulls – not persuasive. It is this precise scenario – an accomplice who must implicate the defendant in order to hide his own culpability – that Idaho's corroboration requirement addresses. We agree with the district court that FitzMaurice's requested jury instructions were simply wrong under Idaho law. The corrupted instruction was not corrected by other instructions. Although the question is close, we disagree with the

[5] The stick did not show any blood or tissue residue. Although the two brothers have together given several versions of the murder story, never did either claim to have returned to Mark's brush-covered car after the killings.

district court as to the prejudicial effect of the error. There was ample evidence that either one or both of the Lankfords killed the Bravences, but there was no evidence that Mark attacked and killed the Bravences other than Bryan's testimony, and there was strong evidence raised at the habeas proceedings suggesting that Bryan's testimony is inconsistent with the forensic evidence. Counsel's request that the jury be instructed that it could convict on the basis of Bryan's testimony alone was plainly prejudicial.

IV. CONCLUSION

The judgment of the district court is reversed and the case is remanded with instructions to grant the petition for a writ of habeas corpus, with appropriate instructions to retry Mark Lankford within a reasonable time or release him.

REVERSED and REMANDED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MARK HENRY LANKFORD, Petitioner, v. A. J. ARAVE, Warden, et al., Respondents.	CIVIL NO. 92-0321-S-WFN **CAPITAL CASE** **MEMORANDUM DECISION AND ORDER ON REMAND**

(Filed May 16, 2003)

Currently pending before the Court are Petitioner's claims of ineffective assistance of counsel as stated in his Petition for Writ of Habeas Corpus. The Court conducted a three-day evidentiary hearing on the claims, and now issues the following decision.

I.

OVERVIEW

On May 5, 1999, the Court dismissed Petitioner Mark Henry Lankford's ("Lankford") Amended Petition for Writ of Habeas Corpus. Lankford appealed the dismissal to the Ninth Circuit Court of Appeals. While his appeal was pending, the court of appeals issued a decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), addressing the application of Idaho's procedural bar to ineffective assistance of counsel claims. As a result of the *Hoffman* decision, the parties in this case stipulated to a limited remand of Lankford's ineffective assistance of counsel claims. The stipulation was granted by the court of appeals, and the case was remanded to this Court.

Pursuant to the remand, this Court conducted a three-day evidentiary hearing. At the conclusion of the hearing, the Court allowed the submission of post-hearing briefs. The Court, having considered the arguments of counsel and having reviewed the state court record, as well as the testimony and evidence submitted during the hearing, concludes that Lankford has failed to set forth a constitutional violation which would entitle him to relief.

II.

BACKGROUND

On September 24, 1983, the bodies of Robert and Cheryl Bravence were found by hunters in the forest in Idaho County, Idaho.[1] Lankford's abandoned 1982 Chevrolet Camaro was found nearby. The Bravences' van was found in California, and Lankford's fingerprints, as well as those of his brother, Bryan were found on items in the van. As a result, Lankford and Bryan were arrested and charged with the murders.

At Lankford's trial, Bryan testified for the State based on his belief that he would be sentenced to an indeterminate life sentence in exchange for his testimony. According to Bryan, he and Lankford left Texas and traveled to Idaho County where Lankford killed the Bravences with a nightstick in order to steal their van. This was the same testimony that Bryan gave at his own trial.[2] In support of

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[1] A full recitation of the facts surrounding the murders can be found in *State v. Lankford,* 116 Idaho 860, 864 (1989).

[2] Bryan's trial took place first. At the request of the prosecutor, his sentencing hearing was postponed until after Lankford's sentencing hearing. *See Lankford v. State*, 500 U.S. 110, 114 (1991).

Bryan's testimony at Lankford's trial, the State called a medical expert who testified that the Bravences died from multiple blows to their skulls, and witnesses who placed Lankford and Bryan near the Bravence campsite.

III.

STATE PROCEDURAL HISTORY

A jury convicted Lankford of two counts of first degree murder.[3] At Lankford's first sentencing hearing, Bryan testified that in a phone conversation he told a reporter with the Lewiston Morning Tribune that he had lied under oath at Lankford's trial and that it had been he who had bludgeoned the Bravences using a rock and that Lankford was not present at the scene. *See Lankford,* 116 Idaho at 864, 781 P.2d at 201. Later, at Lankford's first motion for new trial, on October 10, 1984, Bryan indicated that Lankford had pressured him into contacting the Lewiston Morning Tribune, and confessing to killing the Bravences. *Motion for New Trial,* 10-10-84, pp. 31-32. The court concluded that Lankford had not presented any new evidence that would have resulted in a different jury verdict, and denied the motion. *Id.*, p. 121.

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[3] Bryan was found guilty of two counts of first degree murder prior to Lankford's trial. However, the sentencing was postponed at the prosecutor's request until Bryan testified at Lankford's trial. Bryan's initial sentencing hearing was October 14, 1984. The hearing was then continued until October 16, 1984. After the court sentenced Lankford to death on October 16, the court reconvened Bryan's sentencing hearing and also sentenced him to death. *See Lankford v. Idaho,* 500 U.S. 110, 116 (1991). Bryan's sentence was later overturned by the United States Supreme Court and on remand he was given a fixed life sentence.

On October 16, 1984, Lankford was sentenced to death for two counts of first degree murder. Bryan was also sentenced to death on October 16, 1984; afterwards he executed a written statement in which he stated he was solely responsible for the Bravences' deaths. *Id.* On May 29, 1986, at Lankford's second motion for new trial, Bryan testified that he was primarily responsible for the murders, and that his testimony at Lankford's trial was false. *Id.* After cross-examination by the prosecutor, the court asked Bryan several questions. Bryan then invoked his Fifth Amendment right against self-incrimination and refused to answer any further questions. The court ultimately struck Bryan's testimony, and denied the second motion for new trial. *Motion Hearing,* 4-16-87, p. 6.

Lankford appealed his conviction and sentence, the denial of his amended petition for post-conviction relief, and the denial of his second motion for new trial. The Idaho Supreme Court affirmed the conviction and sentence, as well as the denial of the amended petition for post-conviction relief, and motion for new trial. *See State v. Lankford,* 116 Idaho 860 (1989).

IV.

FEDERAL PROCEDURAL HISTORY

Lankford's Amended Petition for Writ of Habeas Corpus was filed on January 31, 1996, and contained twenty-eight claims. On November 20, 1996, the Court issued an order denying relief on eighteen of Lankford's claims, including all claims of ineffective assistance of counsel based on the doctrine of procedural default. *See* Memorandum Decision and Order (Docket No. 44). Following oral argument, the Court denied the remainder of

Lankford's claims on the merits. *See* Memorandum Decision and Order (Docket No. 92). On May 5, 1999, following Lankford's Motion to Alter or Amend, the Court issued a final decision and judgment. *See* Memorandum Decision and Order (Docket No. 101).

On April 2, 2001, pursuant to the parties' stipulation, the Ninth Circuit Court of Appeals issued a mandate remanding the ineffective assistance of counsel claims back to this Court. On June 21, 2001, the Court granted Petitioner's request for an evidentiary hearing. On February 11, 2002, the Court granted Lankford's motion to amend the petition to include a claim of constitutional violation for judge sentencing (*Ring* claim). The Court then summarily denied the claim. The Court also denied the motion to amend as to claim 2, a claim of ineffective assistance of appellate counsel, and denied reconsideration of the remainder of the procedurally defaulted claims.

V.

EVIDENTIARY HEARING

Lankford's ineffective assistance of counsel claims fall into three categories: failure to present or object to prejudicial jury instructions, failure to investigate or secure experts, and failure to properly present mitigating evidence at sentencing. The following ineffective assistance of counsel claims were the subject of the remand: (4) trial counsel's failure to request an instruction that robbery was a specific intent crime, (8) trial counsel's failure to adequately investigate the issue of the cause of death of the victims, (9) trial counsel's failure to impeach Bryan Lankford's testimony regarding the alleged murder weapon, (10) trial counsel's submission of an incorrect jury

instruction on accomplice testimony which was read to the jury, (13) trial counsel's failure to investigate Lankford's mental state at guilt and penalty phases, and (20) trial counsel's failure to adequately prepare for and present mitigating evidence at the sentencing hearing. Lankford concedes that evidence concerning claim 4 and the portion of claim 13 alleging failure to investigate his mental state at the guilt phase, is not sufficient to obtain relief. *See Petitioner's Post-Evidentiary Hearing Brief,* p. 2, n.1.

A. INEFFECTIVE ASSISTANCE OF COUNSEL

1. STANDARD OF REVIEW

a. Generally

A defendant is constitutionally entitled to effective representation by counsel. A defendant challenging his counsel's performance at trial or at a capital sentencing proceeding as ineffective must meet a two-prong test. *Strickland v. Washington,* 466 U.S. 668, 686-87 (1984). First, the defendant must show that counsel's performance was so deficient that he failed to function as the "counsel" guaranteed by the Sixth Amendment. *Id.* The second prong requires the defendant show that the deficient performance prejudiced the defense by establishing that counsel's errors were so serious as to deprive the defendant of a fair trial – a trial with a result that is reliable. *Id.* Unless both showings are made, a defendant is not entitled to relief because it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. *Id.*

b. Deficient Performance

In order to demonstrate that counsel was constitutionally ineffective, the defendant must show that counsel's performance was so deficient that it fell below an "objective standard of reasonableness." *Hensley v. Crist*, 67 F.3d 181, 184 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 688). Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation. *United States v. Ferreira-Alameda,* 815 F.2d 1251, 1253 (9th Cir. 1987) (quoting *United States v. Hamilton,* 792 F.2d 837, 839 (9th Cir. 1986)). To prevail on an ineffective assistance of counsel claim, a defendant must overcome a strong presumption that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment" to establish that counsel's performance was outside the "wide range of professionally competent assistance." *Clabourne v. Lewis,* 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting *Strickland*, 466 U.S. at 690).

In determining whether counsel's conduct falls within the broad range of professionally acceptable conduct, the Court does not view counsel's actions through "the distorting lens of hindsight." *Hendricks v. Calderon*, 70 F.3d 1032, 1036 (9th Cir. 1995) (quoting *Deutscher v. Whitley,* 884 F.2d 1152, 1159 (9th Cir. 1989), *vacated on other grounds, Angelone v. Deutscher,* 500 U.S. 901 (1991)). A court deciding an ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. *See Strickland,* 466 U.S. at 690. An attorney's actions must be examined according to what was known and reasonable at the time the attorney made his choices.

Id; see also Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995). Tactical decisions that are not objectively unreasonable do not constitute ineffective assistance of counsel. *Hensley,* 67 F.3d at 185; *Hughes v. Borg,* 898 F.2d 695 (9th Cir. 1990).

c. Prejudice

In evaluating the second prong of the test, the Court must assess whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *See Hensley,* 67 F.3d at 184 (quoting *Strickland,* 466 U.S. at 694). The "prejudice" component of the *Strickland* test focuses on the question of whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair. *Id.,* 466 U.S. at 687. The defendant must also show that the deficient performance prejudiced the defense and made the trial results unreliable. *Kimmelman v. Morrison,* 477 U.S. 365, 374 (1986) ("The essence of an ineffective assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect"); *see also Hensley,* 67 F.3d at 184.

The defendant must show that as a result of the errors, "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 693-94. *A* reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

2. CLAIMS AT ISSUE

a. Failure to Retain Experts – Claims 8 & 9

Lankford argues that his trial attorney, Gregory FitzMaurice's failure to retain a forensic expert was ineffective and prejudicial in two critical respects. First, in claim 8, Lankford argues that counsel was ineffective for failing to hire a forensic expert to adequately investigate the issue of the cause of death of the Bravences. Lankford contends that FitzMaurice should have known that the weapon used to kill the Bravences could be an issue in the case, and that an independent forensic expert would have allowed FitzMaurice to establish the cause of death of the Bravences. Second, in claim 9, Lankford alleges that FitzMaurice was ineffective for failing to impeach Bryan regarding the alleged murder weapon, and a forensic expert would have enabled him to challenge Bryan's story that Lankford had committed the murders using a nightstick.

After his arrest, Bryan told the police that Lankford had hit the Bravences one to three times each with an unweighted nightstick, approximately 12 inches long.[4] Bryan also admitted that he had entered the Bravences' campground first carrying a shotgun. *Trial Transcript (TT),* pp. 1304, 1334, 1372-73. However, Lankford told FitzMaurice that Bryan had killed the Bravences with a rock in Lankford's absence. *Evidentiary Hearing Transcript (ET),* pp. 25, 50. Lankford did admit to helping Bryan dispose of the bodies and stealing the Bravences' credit cards and van. *Id.*

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[4] Bryan had also given conflicting versions of his story to police.

Based on Lankford's version of the events surrounding the murders, as well as the fact that he did not believe a mental defense was viable,[5] FitzMaurice decided to present an alibi defense. *ET*, pp. 104-05, 107. In assessing essentially this strategic decision by counsel, judicial scrutiny of counsel's performance must be highly deferential, every effort must be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. *See Strickland,* 466 U.S. at 689. A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.,* 466 U.S. at 691.

Lankford bears the burden of proving that FitzMaurice's assistance was neither reasonable nor the result of sound trial strategy. *Murtishaw v. Woodford* 255 F.3d 926, 939 (9th Cir. 2001). Based on Lankford's own version of events, FitzMaurice's choice of an alibi defense was warranted. However, this defense did not preclude Lankford from testifying to his version of events. If Lankford had testified, and told the jury that Bryan had killed the Bravences using a rock, the opinion of the forensic expert regarding the type of weapon used to kill the Bravences would be significant. However, FitzMaurice advised Lankford not to take the stand, having concluded that Lankford was not a sympathetic defendant, and that he would be subject to cross-examination regarding his participation in hiding the Bravences' bodies, stealing

[5] Prior to trial, FitzMaurice did seek a competency evaluation of Lankford. *Defendant 's Exhibit,* No. 107. That examination proved that Lankford was competent to stand trial. *Id.*

their van, using their credit cards, and selling their camera. In advising Lankford not to testify, FitzMaurice also prevented the prosecution from raising Lankford's prison record, as well as asking any questions regarding Lankford's drug use at the time of the offense. *TT,* p. 1464. In addition, FitzMaurice concluded that Lankford's pro se cross-examination of Bryan during the trial conveyed to the jury Lankford's indignation at Bryan's lies.[6] *TT,* p. 1309; *ET,* pp. 43, 114. Finally, FitzMaurice planned to discredit Bryan's testimony with his prior inconsistent statements, establish that he had killed the Bravences, and reveal that Bryan was testifying in exchange for an extremely lenient sentencing agreement. *ET,* pp. 32-33 & 103-04.

Therefore, FitzMaurice chose to present an alibi defense, to attack Bryan's credibility and to keep Lankford off the stand. This was not a bad strategy. Bryan had told various stories to law enforcement regarding the murders, and his credibility was at issue. Presenting Lankford's story would have diverted the jury by forcing it to evaluate *his* credibility. Lankford's story was no more credible than Bryan's story. Therefore, Lankford might not have fared well in such an evaluation.

Lankford's story was that Bryan, while carrying a shotgun over one arm, forced Robert Bravence, a Marine, to the ground, picked up a very large rock with his free hand, and delivered the fatal blow. The idea that Bryan, acting alone, could pick up a very large rock with one hand

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[6] During the cross-examination, Lankford called Bryan a liar several times and had to be escorted from the courtroom. *TT,* p. 1307-08.

while keeping the shotgun pointed at the victim with the other hand seems farfetched. The jury might well have thought so. The jury may have then concluded that both brothers' testimony was incredible and that, based on their stories, both had been involved. The jury may have concluded that one brother could have been holding the shotgun to prevent Mr. Bravence from defending himself, while the other picked up the rock with both hands and delivered the blows.

By not presenting Lankford's testimony, FitzMaurice kept the jury's focus on Lankford's alibi and Bryan's credibility. Based on the facts of this case, the Court concludes that FitzMaurice made a reasonable strategic decision, and that decision does not constitute deficient performance. As a result, the Court is not persuaded that FitzMaurice's failure to consult an independent forensic expert to testify that a rock caused the blunt trauma injuries was deficient.

First, FitzMaurice had no certain way to introduce testimony regarding Lankford's claim that Bryan killed the Bravences with a rock. Thus, the benefit of independent forensic testimony would only have aided FitzMaurice in discrediting Bryan's story that the Bravences were killed using a nightstick. FitzMaurice concluded that, since Lankford's defense was that he was not present at the time of the murders, the instrument used to inflict the blunt trauma was not important. *ET,* p. 146.

Second, FitzMaurice was able to elicit favorable testimony from the State's medical expert, Dr. Cihak. At trial, Dr. Cihak testified that the cause of death for both Robert and Cheryl Bravence was blunt trauma to the head. *TT,* pp. 1050 & 1055. Dr. Cihak stated that blunt

trauma was caused by something not sharp, "such as a club or a stick or a piece of pipe." *TT,* p. 1050. Dr. Cihak also testified that he was unable to render an opinion regarding the size of instrument that would be necessary to render the trauma to either victim. *TT,* p. 1057. On cross-examination, FitzMaurice asked Dr. Cihak if the injury could have been caused by the butt of a shotgun, the weapon Bryan had admitted carrying into the Bravence campground. *TT,* p. 1068. Dr. Cihak testified that the blunt trauma could have been caused by the butt of a shotgun. *TT,* p. 1068. The murder weapon was never identified. *ET,* p. 141. In addition, the nightstick Bryan said was the murder weapon was found in Lankford's car, but could not be connected to the murders. *ET,* p. 141. FitzMaurice did not ask Dr. Cihak whether a large rock could have caused the Bravences' wounds. *ET,* p. 113.

At the federal evidentiary hearing, Lankford presented testimony from a forensic pathologist, Dr. Todd Grey. Dr. Grey reviewed the photographs taken of the victims' skulls, and testified that: "My opinion is that the pattern of injury that I saw described both in the autopsy report and documented photographically was much more consistent with the scenario in which these individuals were struck with the large rock." *ET,* p. 255. However, Dr. Grey also testified that a nightstick could have inflicted the blunt trauma injuries to the Bravences, although he indicated that more than the one to three blows Bryan testified to seeing Lankford inflict would be needed. *ET,* pp. 261 & 275.

While it appears that a forensic expert could have added some benefit by confirming Dr. Cihak's conclusion that the cause of death was blunt trauma, it does not appear that the expert could have identified the weapon

used to kill the Bravences. Thus, the benefit of an additional expert testifying that the murder weapon could have been something other than a nightstick is cumulative to Dr. Cihak's own testimony. In addition, consultation with an independent forensic expert would not have exculpated Lankford.

Furthermore, the Court finds that FitzMaurice did an adequate job of attacking Bryan's credibility by showing that he had previously lied to law enforcement officers and that his version of the events surrounding the deaths of the Bravences was a lie. During his cross-examination, FitzMaurice got Bryan to admit that he lied to the FBI in his initial statement, and that he was avoiding a death sentence by testifying. *TT,* pp. 1341-42. Four separate times during Bryan's testimony FitzMaurice presented him with his prior inconsistent statement and asked him to explain the lie. In his closing argument, FitzMaurice focused on the inconsistencies in Bryan's stories to law enforcement officers, at his own trial and at Lankford's trial. *TT*, pp. 1579-1599. A forensic expert could not rule out that a nightstick was not the murder weapon, the Court is not persuaded that FitzMaurice's failure to call a forensic expert to challenge Bryan's story constitutes deficient performance.

FitzMaurice had a client whose version of the events surrounding the Bravence murders made him culpable for heinous acts, and a prosecution witness whose credibility could be attacked and whose involvement was not in question. The forensic evidence was not clear cut, and there was no murder weapon. FitzMaurice's defense focused on Lankford's absence and Bryan's credibility. FitzMaurice's failure to retain a forensic expert who *may*

have aided him in impeaching Bryan about the type of weapon used was not deficient performance. The evidence shows that expert pathologists, both at trial and at the federal evidentiary hearing, were unable to identify the murder weapon, and Dr. Cihak conceded that the weapon may have been a shotgun butt. Lankford's request for relief on claims 8 and 9 will be denied.

b. Jury Instructions – Claim 10

Lankford alleges that FitzMaurice was ineffective for submitting erroneous and contradictory jury instructions on accomplice testimony which were read to the jury. At the time of Lankford's trial, Idaho did not have standard jury instructions. *ET,* p. 54. At the federal evidentiary hearing, FitzMaurice testified that prior to proposing the instructions, he had done research on the issue at the University of Idaho Law School library and at the state law library. *ET*, p. 51. FitzMaurice researched instructions regarding accomplice testimony and submitted three jury instructions to the court, which were accepted and read to the jury, as instructions nos. 16, 19 and 20. *TT,* pp. 1549-50; *ET,* pp. 52-53, 123; *Pet's Exhibits*, nos. 22-23.

Defendant's Requested Instruction No. 16 reads as follows:

> An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence,

> and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

Pet's Exhibit no. 22. Instruction no. 16 is taken from federal jury instructions and is a misstatement of Idaho law, stating that if a juror believes an accomplice's testimony beyond a reasonable doubt, that juror may vote to convict even though the accomplice's testimony is unsupported. *Id.*

Defendant's Requested Instruction No. 19 reads as follows:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

Pet's Exhibit, No. 23.

Defendant's Requested Instruction No. 20 reads as follows:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.
>
> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Pet's Exhibit, No. 23. Instructions nos. 19 and 20 are taken, in part, from Idaho Code § 19-2117 and *State v. Wilson,* 93 Idaho 194 (1969), and are a correct statement of Idaho law. All three instructions were read to the jury.

Respondent contends that FitzMaurice's inclusion of the erroneous instruction was trial strategy. However, merely labeling such a choice "'trial strategy' does not automatically immunize an attorney's performance from sixth amendment challenges." *United States v. Span,* 75 F.3d 1383, 1389 (9th Cir. 1996). Counsel's performance is constitutionally deficient if "[c]ounsel's errors with the jury instructions were not a strategic decision to forego one defense in favor of another" but "the result of a misunderstanding of the law." *Id.,* 75 F.3d at 1390. FitzMaurice

thought there was a plausible reason for submitting the anomalous jury instruction, but could not remember the reason. *ET,* p. 123. However, review of the three instructions reveals that FitzMaurice's submission of the erroneous jury instruction could not have been a strategic choice, but was the result of his failure to understand the applicable law. Simply reviewing the three instructions would have revealed that two instructions, nos. 19 and 20, conformed with Idaho's law regarding accomplice testimony, while instruction no. 16 was substantially different, as well as not being in conformance with Idaho law. Thus, proposal of the instruction to the court was deficient performance by FitzMaurice.

Having reached that conclusion, however, the Court cannot find that Lankford has established prejudice. In *Cupp v. Naughten,* 414 U.S. 141, 147 (1973), the Supreme Court reiterated a long established principle that, in determining the effect of a jury instruction on the validity of the conviction of a habeas petitioner, "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." This principle stems from a recognition that, not only is a challenged instruction one of many instructions, but a judgment of conviction is the culmination of a trial encompassing the testimony of witnesses, argument of counsel, receipt of exhibits in evidence, as well as the judge's instructions to the jury. *Id.* In considering that two correct instructions were read to the jury regarding accomplice testimony and that these instructions included the correct statement of the law, the Court cannot find there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Strickland,* 466 U.S. at 693-94. As a result,

the Court cannot find that it rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.,* 466 U.S. at 687. Lankford's request for relief on this claim will be denied.

c. Sentencing – Claim 13

In claim 13, Lankford alleges that FitzMaurice was ineffective for failing to investigate his mental state. Following the guilty verdict FitzMaurice sought a psychological evaluation. *ET,* p. 64. He did not specify that he wanted it solely for defense purposes, although he had been advised to do so. *Id.* The trial court granted the request, and ordered psychiatrist Dr. Michael Estess to examine Lankford and address the following: his mental condition, any mental illness or defect, possibilities of treatment, risks and benefits of treatment or non-treatment, and risk of danger to the public if the defendant were at large.[7] *Clerk's Record,* pp. 541-542; *Pet's Exhibit,* no. 33. However, the trial court ordered that copies of the evaluation be sent to FitzMaurice, the prosecutor and the trial court. *Pet's Ex.* no. 33. FitzMaurice had been advised by an attorney with capital experience to oppose the court ordered psychological examination. *Pet's Exhibits,* nos. 25-30; *ET,* pp. 303-04. FitzMaurice did not oppose the evaluation, and was not present at the evaluation. FitzMaurice did not provide any information to Dr. Estess regarding Lankford's family history, or previous mental health exams, including a 1976 examination at

[7] The Order granting the examination of Lankford by Dr. Estess was filed May 17th. *ET,* pp. 72-73, 133. However, Dr. Estess conducted his mental examination of Lankford on May 8-9th. *Id.* The court had advised FitzMaurice of the examination prior to the date it occurred. *Id.*

Rusk State Hospital in Texas. FitzMaurice was aware that Dr. Estess had a pro-prosecution bias and had warned Lankford. *ET,* p. 70-72.

Dr. Estess' psychological evaluation concluded that Lankford had a "distinctly paranoid and explosive quality about his affective posture." *Pet's Exhibit,* no. 41. In addition, Dr. Estess found that Lankford had a "manipulative and exaggerated style of presenting himself," and that "prominent in his personality development are explosive features." *Id.* Dr. Estess diagnosed him with an "anti-social personality disorder," and "a sociopathic personality disorder with explosive features." *Id.* Based on these diagnoses, Dr. Estess concluded that Lankford was not a candidate for psychiatric treatment, and stated, "[t]he only real treatment for people with personality problems, is to experience the natural consequences of their behavior." *Id.*

FitzMaurice was aware that the report contained information that could be used to support aggravating factors, but he did not consult another doctor to review the report. *ET,* pp. 69-73. In addition, Lankford became discouraged after receiving the report and refused to be evaluated by another doctor. *Id.* FitzMaurice then focused on presenting the positive information in the report to the trial court. This information included the fact that Dr. Estess had found Lankford to be cooperative and agreeable, quite logical and possessing "above average intellectual capacity." *Pet's Exhibit,* no. 41.

At the federal evidentiary hearing, Lankford presented testimony from forensic psychiatrist, Dr. James Missett. Dr. Missett stated that a mental health expert on the defense team would have aided FitzMaurice in his

cross-examination of Dr. Estess by advising him to challenge the basis for his conclusions, some of which were used by the trial court in support of aggravating factors. *Evidentiary Hearing Transcript, 9-17-02*, p. 60. In addition, Dr. Missett would have pointed out the problems with Dr. Estess basing his diagnosis of anti-social personality disorder on the interview with Lankford, rather than on records or testing. *Id.* Dr. Missett testified that Dr. Estess' diagnosis of anti-social personality disorder is improper unless there is clear evidence of anti-social behavior prior to age 15, and there is no such evidence in the records. *ET, 9-17-02*, p. 45, 60. Dr. Missett also testified that Dr. Estess' conclusion that Lankford was not amenable to rehabilitation based on his diagnosis of anti-social personality disorder was damaging and incorrect. *Id.*

The trial court relied on several factors contained in Dr. Estess' report in concluding that each aggravating circumstance was not outweighed by the mitigating circumstances. In addition to the statutory aggravating factors under Idaho Code § 19-2515, the court found that (1) defendant has a sociopathic personality disorder, (2) defendant has an explosive personality and is a frustrated and angry individual, (3) defendant is manipulative and deceitful, violent, intimidating and dangerous, impulsive, lacks self-control and discipline, easily roused to violence. *Sentencing Transcript,* p. 369. Many of these conclusions appear to have come from Dr. Estess' psychological evaluation of Lankford.

Lankford argues that effective representation dictates that FitzMaurice, having received Dr. Estess' report, should have consulted another mental health expert. The Court is not persuaded. Because Lankford would have refused to cooperate with another psychologist, the only

benefit of an additional expert would have been to rebut the conclusions in Dr. Estess' report. Certainly, it appears that an expert would have helped FitzMaurice navigate the confusing diagnoses of both anti-social personality disorder, and sociopathic personality disorder.[8] However, the Court finds that while calling an expert at the sentencing hearing to rebut Dr. Estess' conclusions may have cast doubt on the diagnosis that Lankford suffered from anti-social personality disorder, the expert would have been unable to aid FitzMaurice in refuting Dr. Estess' other conclusions, which were based on Dr. Estess' interview with Lankford, and also relied upon by the trial court as aggravating circumstances. Thus, the Court cannot conclude that failure to seek another expert was deficient performance. Lankford's request for relief on claim 13 is denied.

d. Sentencing - Claim 20

In this claim, Lankford contends that FitzMaurice was ineffective for failing to investigate and present mitigating evidence on his behalf at sentencing.[9] The Ninth Circuit Court of Appeals has established a rigorous standard which substantially eases a petitioner's burden of establishing ineffective assistance of counsel. For example, the court of appeals has indicated that all

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[8] Dr. Missett testified that sociopathic personality disorder was a term that was then in use for the term "anti-social personality disorder." *ET,* p. 43. However, Dr. Estess used both terms in his 1984 report. *Pet's Exhibit,* no. 41.

[9] At sentencing, mitigating evidence consisted of any information about the crime, the circumstances surrounding it, or the defendant and his background which might persuade the trial court that the death penalty was not warranted.

relevant mitigating information should be unearthed for consideration at the capital sentencing phase. *Smith v. Stewart,* 241 F.3d 1191, 1198 (9th Cir.2001); *Wallace v. Stewart,* 184 F.3d 1112, 1117 (9th Cir.1999). Failure to present mitigating evidence at the penalty phase of a capital case constitutes ineffective assistance of counsel. *Bean v. Calderon,* 163 F.3d 1073, 1079 (9th Cir.1998). After a sufficient investigation, "counsel may make a reasonable strategic judgment to present less than all possible available evidence in mitigation." *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir. 1985) (quoting *Stanley v. Zant,* 697 F.2d 955, 965 (11th Cir.1983)). However, defense counsel's failure to investigate and present evidence of a person's mental impairment and social history constitutes deficient performance. *Smith*, 241 F.3d at 1198 (citing *Williams v. Taylor,* 529 U.S. 362, 396 (2000)). Counsel has an obligation to conduct a thorough investigation of a defendant's background. *See Williams,* 529 U.S. at 396 (concluding that counsel was deficient in failing to conduct an investigation that would have uncovered records describing a "nightmarish childhood" and borderline mental retardation).

Following the guilty verdict, Lankford told FitzMaurice that he did not want to prepare for sentencing because he thought that Bryan would recant his testimony, the court would grant the motion for new trial, and the conviction would be set aside. *ET,* p. 118. In addition, FitzMaurice stated that Lankford told him not to present mitigation evidence because, if convicted, he wanted the death penalty. *ET,* p. 129. Lankford also indicated that he thought the family would rally around Bryan and try to save him, and he did not want family involved. *ET,* pp. 119, 126-128. However, Lankford did provide names of

family members, FitzMaurice contacted them, and some family members supplied letters in support. *Id.* In addition, FitzMaurice apparently had the names of Lankford's co-workers, but did not follow up with them. *Id.*

FitzMaurice did not engage an investigator to locate any mitigation witnesses or evidence, and did not gather any genealogical, medical, school, institutional, psychological, psychiatric, prison or employment records prior to sentencing. *ET,* pp. 88, 129. Instead, FitzMaurice relied upon the pre-sentence investigator to search out and obtain the relevant mitigation evidence. After receiving the pre-sentence report, FitzMaurice filed a Motion to Augment Pre-sentence Report on July 30, 1984, seeking the pre-sentence investigator to gather records regarding Lankford's past criminal record, past incarceration in Texas, a more complete statement of family data, his employment history, including information regarding work habits and personality, the psychiatric evaluation performed on Lankford in 1976, and his school records.[10] *Pet's Exhibit,* no. 38. FitzMaurice concluded that this would allow for mitigating evidence to be presented to the court without violating Lankford's wishes not to investigate. *ET,* pp. 128-29. At sentencing FitzMaurice did not present any mitigating evidence, and Lankford was the sole witness in his defense. *Sentencing Transcript,* pp. 126-377.

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[10] The pre-sentence investigator filed two supplemental special reports, on August 13, 1984, and September 6, 1984. *Pet's Exhibits,* nos. 39 & 43.

i. Deficient Performance

FitzMaurice concluded that he was prevented from investigating and presenting mitigating evidence to the court based on his client's wishes. However, counsel's duty to investigate mitigating evidence is neither entirely removed nor substantially alleviated by his client's direction not to call particular witnesses to the stand, *See Silva v. Woodford,* 279 F.3d 825, 838 (9th Cir. 2002). A lawyer who abandons investigation into mitigating evidence in a capital case at the direction of his client must at least have adequately informed his client of the potential consequences of that decision and must be assured this his client has made "informed and knowing" decision. *Id.* (quoting *Jeffries v. Blodgett,* 5 F.3d 1180, 1198 (9th Cir. 1993)).

In this case, the Court cannot find that Lankford made an "informed and knowing" decision to abandon mitigation. There is no testimony in the record that Lankford forbade FitzMaurice from contacting family members, in fact, Lankford clearly felt that family witnesses could be called who would provide testimony in mitigation. *Sentencing Transcript,* p. 342. Lankford gave FitzMaurice the names of family members to contact, and FitzMaurice had favorable letters from family members. In addition, FitzMaurice did not follow up with Lankford's co-workers. Based on the overall record, including Lankford's testimony at sentencing, the Court finds that there was no informed and knowledgeable waiver.

Furthermore, FitzMaurice's failure to gather these necessary records, conduct interviews and present relevant mitigating evidence about Lankford resulted in a one-sided presentation of information to the court.

FitzMaurice's reliance on the pre-sentence investigator to unearth information about Lankford's childhood trauma, and relative productivity prior to his drug use, his former hospitalization, and his rehabilitative potential from his previous incarceration resulted in additional negative information being presented to the court. FitzMaurice testified that he felt this would allow additional information to come before the court without violating his client's wishes not to prepare for sentencing. Instead it resulted in the loss of control of information since FitzMaurice was not able to keep negative information from being presented to the court.

FitzMaurice testified that he believed that Lankford did not want him to conduct a mitigation investigation. This is contradicted by Lankford's own statements at sentencing when he appears to be frustrated by the lack of presentation of evidence on his behalf. FitzMaurice testified that he did not conduct any investigation because he was intent on preserving his good relationship with his client, but at that point in the case, FitzMaurice had little to lose. His client had already been convicted of first degree murder and was facing the death penalty, and his belief that the preservation of the relationship was worth failing to unearth mitigating evidence was not reasonable.

The Court finds that FitzMaurice's failure to present any mitigation evidence at sentencing, and his decision to rely on the pre-sentence investigator to unearth mitigating information constitutes deficient performance. However, in order to succeed on this claim, Lankford must establish that he suffered prejudice as a result of the ineffective representation.

ii. Prejudice

Having concluded that FitzMaurice was ineffective for failing to investigate and present mitigating evidence on Lankford's behalf, this Court cannot find that the record supports a finding of prejudice. To establish prejudice, Lankford must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different." *Strickland,* 466 U.S. at 694. Thus, Lankford must show that, but for FitzMaurice's deficient performance in failing to present mitigating evidence, he would not have received the sentence that he did. A reasonable probability is one "sufficient to undermine confidence in the outcome." *Id.*

The court found several mitigating factors vitiated against imposition of the death penalty, including the fact that: (1) the defendant may be rehabilitated through psychotherapy, (2) the defendant has reacted favorably to incarceration, (3) the defendant was mistreated as a child, and (4) the defendant has a history of abusing marijuana. *Sentencing Transcript,* p. 368.

At the sentencing hearing, Lankford testified that his brother Robert Lankford, Robert's wife, Colleen, his sister, Nora Lankford and his mother, Gretchen Maurer, would have been witnesses who could have testified to his good character. *Sentencing Transcript,* p. 342. However, both Robert Lankford and Ms. Maurer provided negative statements to the pre-sentence investigator about Lankford's character, including his violent tendencies and his manipulation of Bryan. While most of the family witnesses, including Robert and his mother, testified to the abuse that Lankford suffered at the hands of his father, all labeled Lankford a violent individual.

In determining prejudice, this Court must look at the information the court had when sentence was imposed. The court found five aggravating factors under Idaho Code § 19-2515(f): (a) Lankford committed two murders, (b) the murders were especially heinous, atrocious or cruel, and manifested exceptional depravity, (c) Lankford exhibited utter disregard for human life, (d) felony murder, and (e) Lankford exhibited a propensity to commit murder. *Findings of the Court in Considering Death Penalty under 19-2515, Idaho Code, October 16, 1985, pp. 3-4.* The court also concluded, among other things, that Lankford "carried the non-conscious Bravences into the woods and covered their bodies with brush not knowing whether or not they were dead," that they were killed merely for money and their van, and that the murders were committed with an abandoned and malignant heart. *Id.* The court also concluded that it could not be determined how many blows were struck by Lankford or Bryan, and that either brother could have prevented the killings. *Id.* At the federal evidentiary hearing, Lankford did not present any substantial and compelling mitigating evidence relating to Lankford's past that was not before the trial court during the penalty phase. The witnesses that Lankford intended to call would not have provided any additional compelling mitigating information that was not already before the court. At the federal evidentiary hearing, Lankford produced testimony from his cousins who stated that Lankford's father was brutal, and abusive, especially to him. However, this fact was already before the trial court. In addition, Lankford's former co-worker testified that he was a good friend. In the face of the overwhelming aggravating circumstances found by the trial court, this testimony has little impact. Ultimately, the failure to present mitigating evidence was not prejudicial because given

the overwhelming aggravating factors, and the heinous nature of the crime, there is no reasonable likelihood that the sentence would have been different. *See Campbell v. Kincheloe,* 829 F.2d 1453, 1464 (9th Cir. 1992).

Finally, nothing in *Strickland* suggests that a proportionality review is inappropriate when considering prejudicial effect. *See Mak v. Blodgett,* 970 F.2d 614, 621 (9th Cir. 1992); *Campbell,* 829 F.2d at 1465. This Court finds most compelling that the court also sentenced the allegedly less culpable brother, Bryan, to the death penalty even though the prosecutor did not seek that sentence. *See Lankford v. Idaho,* 500 U.S. 110 (1991).

For all these reasons, the Court concludes that the deficient performance by FitzMaurice in failing to conduct an independent mitigation investigation, or a minimal one, was not sufficiently prejudicial to "undermine confidence in the outcome" of the penalty phase of Lankford's trial. Lankford's request for relief on claim 20 is denied.

VI.

ORDER

Based on the foregoing, and the Court being otherwise fully advised;

IT IS HEREBY ORDERED

Claims 4, 6, 8, 9, 10, 13, and 20 are **DENIED.** The Petition for Writ of Habeas Corpus is **DISMISSED.** The Stay of Execution dated August 18, 1992, (dkt. #6) is **VACATED.**

Dated this 15 day of May, 2003.

/s/ W.F. Nielsen
HONORABLE WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK HENRY LANKFORD, Petitioner-Appellant, V. ARVON J. ARAVE, Warden, Warden, Idaho State Correctional Institution, Respondent-Appellee.	No. 99-99015 D.C. No. CV-92-00321-S-WFN District of Idaho, Boise ORDER (Filed Jan. 29, 2007)

Before: REINHARDT, W. FLETCHER, and BYBEE, Circuit Judges.

The panel judges have voted to deny appellee's petition for rehearing and petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

Appellee's petition for rehearing and petition for rehearing en banc, filed January 3, 2007, is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

MARK HENRY LANKFORD, Petitioner, vs. A. J. ARAVE, Respondent.	No. CS 92-CV-321-WFN September 30, 2002 Boise, Idaho Transcript of Hearing on Writ of Habeas Corpus Volume 1 – Sept. 30, 2002

BEFORE THE HONORABLE
WILLIAM FREMMING NIELSEN

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(Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription)

[Fitzmaurice/direct]

* * *

[50] Q Do you recall that at trial, Bryan Lankford – at Mark's trial that Bryan Lankford testified that Mark hit the Bravenzes in the back of the neck?

A Again, I have not reviewed that transcript. My understanding was that he had struck them in the head.

Q And Mr. Mark Lankford had told you that when he arrived at the campground, he saw the bodies –

A Correct.

Q – is that correct? And that Bryan had brought them back in the van – Bryan had brought Mark back in the van to the campground?

A That is my understanding that he had gone to McCallister, picked Mark up and then gone back to the campsite.

Q And at that point Mark saw that the bodies were dead?

A He saw the bodies and I think he believed that they were dead at the time.

Q And he acknowledged to you that he had assisted in the disposing of these bodies?

A Yes, he did.

Q And, in fact, you asked the jury for an accessory verdict, accessory to killing for Mark Lankford, do you recall that?

A I don't recall that, but I believe I did.

Q Now, in preparation for the trial, did you do research on jury instructions?

A Yes, I did.

[51] Q And do you recall going up to the University of Idaho to do that research?

A Yes, I do.

Q If you would look at Exhibit 29.

A Yes.

Q Would you identify Exhibit 29 for the record?

A It appears to be an affidavit by me asking for reimbursement for extraordinary expenses which included – last page is my handwritten notes, appears to be a request to be reimbursed for travel to Moscow on two different occasions prior to trial and also some services from David Nevin who is an attorney here in Boise, Idaho.

Q Now, if you look, there is a typed Exhibit A, I think is the third page?

A Yes.

Q Is that – that shows April 16th and 17, research at University of Idaho?

A Correct.

Q And then it shows April 21st to 25, jury selection?

A Yes.

Q And research at the state law library?

A Correct.

Q In this case, where was – where was the jury selected?

A Jury was selected in Ada County.

Q So you came down to Ada County on these days partially to [52] do some research and partially to select the jury?

A If those are the same days. I can't recall the exact day we selected the jury, Mr. Parnes, in April.

Q After conducting your research at the University of Idaho, did you submit a packet of jury instructions pretrial?

A Yes.

Q And did you later on submit another packet of instructions during the trial?

A I may have. I believe I did.

Q If you would look at Exhibits 21-22 and 23 please.

COURT CLERK: Just 22 and 23?

MR. PARNES: 22 and 23.

Q Now, 22, the cover sheet, what does that indicate?

A It is defendant's requested jury instructions, 1 through 17. The only one attached is Number 16.

Q Okay. And that is dated what date?

A 19th of April, 1984.

Q And Instruction Number 16 is an instruction that you requested; is that correct?

A It appears to be.

Q If you would look at Exhibit 23.

A Yes.

Q What is the cover sheet of Exhibit 23?

A Again, it is defendant's requested jury Instructions 18 through 38 dated the 2nd of May, 1984.

[53] Q And it includes two instructions, 19 and 20?

A Correct.

Q And you requested those instructions?

A Yes, I did.

Q And as far as you know, those instructions were given, all those?

A There is a check mark on all of those showing given. I can't tell you independently whether they were or not.

Q Do you recall being aware of Idaho Code Section 19217 which is cited at the bottom of Instructions 19 and

20, and were you aware of those at the time that you requested defendant's Instruction Number 16?

A I must have since I cited that particular section. I can't quote you what Idaho Code Section 19217 stated at that point in time.

Q And just so we are clear, the question was when you submitted the first packet of instructions on April 19th, which are different than those instructions contained in Exhibit 23, do you recall being aware of that code section on April 19th?

A I can't recall whether I was aware or not of that code section on April 19th, 1984.

Q What type of research facilities were there in Idaho County?

A Idaho County at the time had a law library consisting of Idaho Code, Idaho Reports, Pacific Reporter, some Horne books [54] and treatises, I believe Wright and Miller on civil procedure. Very limited.

Q And there was no computer research in those days?

A There was no computer research and there was no – Idaho a that point in time did not have standardized forms on criminal jury instructions.

Q Do you recall seeking to have the jury instructed on the issue of Bryan Lankford's credibility?

A I believe I would have, but I don't have a specific recollection.

Q Did you try to bring forth the plea arrangement that this person was faced with – that Bryan Lankford was faced with possible death sentence and yet he believed that he had been offered a 10 year sentence in exchange for his testimony?

A I believe I cross-examined on that issue.

Q Do you believe that you brought forth any jury instructions on that regard?

A I can't tell you, Mr. Parnes, without looking at the complete packet. I would hope I did, but I don't know.

MR. PARNES: Your Honor, would this be a good time for a break?

THE COURT: Yeah, I was just going to suggest that, this is a good time. What do you need – I guess you need 15 minutes; is that correct? Fifteen minutes.

(WHEREUPON, court recessed at this time)

* * *

[Fitzmaurice/Cross]

[120] (WHEREUPON, court reconvened after recess in the courtroom with petitioner and all counsel present for the following record:)

THE COURT: Mr. Anderson, did you find your document?

MR. ANDERSON: I did, Your Honor. Thank you very much.

THE COURT: You may proceed with your cross.

CROSS-EXAMINATION – CONTINUED

BY MR. ANDERSON:

Q Before we go to the document which are my notes and not an exhibit, if I could, Mr. Fitzmaurice, talk to you about the jury instructions. As I understand it, in 1983 and 1984, there were no Idaho pattern jury instructions?

A That is my recollection, there were no pattern jury instructions for criminal cases.

Q And it was your practice at that time to go to the California pattern jury instructions and federal pattern jury instructions and try to work them into Idaho law?

A My procedure was to go to the law library and look at what resources we had from numerous jurisdictions to try to formulate jury instructions that would work in Idaho. Look at Idaho case law also.

Q And that was my very next question, did that include researching the Idaho cases to determine what the jury instructions should look like?

[121] A Correct, and I believe in this case and other cases, Idaho keeps – at the University of Idaho, keeps copies of the complete clerks' transcripts from every appeal that went to the Supreme Court and contained therein are jury instructions which I used as a resource in this case and had used them in the past prior to the time there were pattern jury instructions.

Q So if I understand correctly, in addition to looking at various pattern jury instructions, you actually reviewed the archives at the University of Idaho law school of prior first degree capital cases to find jury instructions?

A I can't tell you I looked at prior first degree capital cases. I know I looked at archives, I may have looked at prior cases, but I was aware of, and not many people knew or know of, archives in the University of Idaho that contained the clerks' records of every case and I used those, but I don't think that is citable unless the actual jury instruction is contained in the appellate opinion, but they are a resource.

Q If I could have you take a look at Exhibit 23 which is your requested Instruction Number 19 please, and if you could look at the second page of that particular exhibit, Exhibit Number 23, which has been admitted, that specifically talks about and references Idaho Code Section 19 dash 2117, correct?

A That it does.

Q And it indicates that a defendant can't be found guilty, and I am going to synopsize it, not read it, based upon the [122] testimony of an accomplice unless there is corroboration; that is the gist of the instruction, correct?

A Correct.

Q Based upon your research and investigation into Mark's case, had you formed an opinion as to whether there was sufficient corroboration in this case to meet that jury instruction?

A I think there was more than sufficient corroboration.

Q Now, you also submitted – if you could take a look at instruction – or excuse me, Exhibit 22, and specifically the second page.

A If you could hold on a second.

Q You bet, sorry. I am trying to slow down. And that was your requested Instruction Number 16, correct?

A Correct.

Q And the last paragraph of that instruction indicates that you should never convict a defendant upon the unsupported testimony of an alleged accomplice unless you believe that unsupported testimony beyond a reasonable doubt, correct?

A Correct.

Q Was part of your strategy in requesting this jury instruction, an expectation that there was, in fact, sufficient corroboration, but that the jury would not be able to find beyond a reasonable doubt that Bryan's testimony was credible?

A I can't tell you at this point in time what my motivations [123] of asking that jury instruction. That appears to be a plausible reason, but I can't tell you honestly that was my reason at that time.

Q Just too many years?

A Correct.

Q Now, you attended Bryan's sentencing hearing, correct?

THE COURT: Out of curiosity, were both of these instructions given?

Q Do you know if the instructions – were those two instructions given?

A All I could say is that on my copies, I note with a check mark they were given, judge, I can't tell you whether the record reflects that they were given.

MR. ANDERSON: And I think counsel and I can stipulate they were both given by the trial court and they are part of the clerk's record.

MR. PARNES: That is so stipulated, Your Honor. I believe the record will reflect that.

THE COURT: All right.

Q Now, as far as family members, Mark's family members that you contacted, you of course could not contact his father, James Lankford, because he was deceased at the time, correct?

A I believe so.

Q Okay. His mother was Gretchen, and if I murder this – if I hurt this name bad, I am sorry, if I say this name wrong I

* * *

781 P.2d 197

Supreme Court of Idaho.
STATE of Idaho, Plaintiff-Respondent,
v.
Mark Henry LANKFORD, Defendant-Appellant.
Nos. 15759, 16192.

July 10, 1989.
Rehearing Denied Oct. 31, 1989.

Gregory Fitzmaurice, Grangeville, Idaho, for defendant-appellant.

Jim Jones, Atty. Gen. and Lynn E. Thomas, Sol. Gen., Boise, for plaintiff-respondent. Lynn E. Thomas argued.

HUNTLEY, Justice.

On May 4, 1984, Mark Henry Lankford was found guilty on two counts of first degree murder. Following the verdicts, the trial court held a sentencing hearing and sentenced Lankford to death. Lankford appeals the murder convictions and sentence, the denial of his amended petition for post-conviction relief, and the trial court's denial of his second motion for new trial. The appeals have been consolidated pursuant to I.C. § 19-2719 (1987). This matter is also before the Court on automatic review under the provisions of I.C. § 19-2827 (1987).

In June of 1983, Mark Lankford and his brother Bryan Lankford packed their belongings and fled from their home state of Texas because Bryan had violated his probation for a robbery conviction and did not want to be sent back to jail. The Lankfords eventually made their way to Idaho County, Idaho, where they camped in a remote forest campground for several days. At that same

time, retired Marine officer Robert Bravence and his wife, Cheryl, were vacationing in a nearby campground.

On September 24, 1983, the bodies of Robert and Cheryl Bravence were found by hunters in the Idaho County forest. Approximately one-fourth of a mile from the bodies a 1982 Chevrolet Camaro registered to Mark Henry Lankford, of Houston, Texas was found. On or about the 5th of July 1983, a vehicle registered to Robert and Cheryl Bravence was located in Los Angeles, California. Fingerprints taken from items found in the Bravence vehicle were identified as belonging to Mark Henry Lankford and Bryan Stuart Lankford.

On October 2, 1983, Mark Lankford and Bryan were arrested in Liberty County, Texas. Subsequent to the arrest, authorities found items belonging to the Bravences in a Liberty County campsite. The Lankfords were extradited to Idaho where they were tried separately for the murders of Robert and Cheryl Bravence. Bryan Lankford agreed to be a witness for the State at his brother's trial because he believed the State Prosecutor had offered him an indeterminate life sentence instead of the death penalty in exchange for his testimony.

Bryan testified as follows: After reaching the Idaho County forest where they hid out, Mark and Bryan decided to steal an automobile from a campsite in the area. They reasoned that, because the monthly payments on Mark's car were delinquent, the police would be searching for it and so they needed to abandon it to avoid capture. They left the car in the woods covered with brush and set off to steal another car. They walked down a mountain road which eventually led to a campsite occupied by Robert Bravence and his wife Cheryl. Bryan entered the

campsite first, with a shotgun draped over his arms, and engaged the Bravences in conversation. Shortly thereafter Mrs. Bravence left the campsite to go down to a nearby stream for some water. After Mrs. Bravence left, Mark Lankford ran out from behind some bushes where he had been hiding, and into the campsite and ordered Robert Bravence to kneel on the ground in front of him. Mark Lankford then hit Robert Bravence in the back of the head with a brown wooden night stick. When Cheryl Bravence returned to the campsite she rushed to the side of her husband who was lying on the ground. Mark Lankford ordered her to kneel down on the ground next to the body of her husband and struck her in the back of the neck with the same nightstick. The Lankfords placed the Bravences' bodies into the Bravence van and drove back to their former campsite where Mark hid the bodies near his Camaro. The Lankfords then drove the Bravence van to Oregon and later to California where they abandoned it in Los Angeles. During their travels they purchased food and accommodations with the Bravences' credit card.

Following Bryan Lankford's testimony on direct examination, Mark Lankford, contrary to advice from counsel and the court, decided to act as his own attorney and cross-examine his brother. After Mark Lankford's inadequate attempt at cross-examination and objection by his attorney, the trial court allowed the attorney to resume his role. At this point, Bryan Lankford invoked his Fifth Amendment privilege and initially refused to answer the trial counsel's questions on cross-examination.

In addition to Bryan Lankford's testimony, pertaining to the causes of death, the State's medical experts testified that the Bravences died from multiple blows to the skull.

After Mark and Bryan were each convicted in separate trials for the first degree murders of Robert and Cheryl Bravence, Bryan recanted the testimony he gave at Mark's trial on three different occasions. At Mark's sentencing hearing Bryan testified that in a phone conversation he told a reporter with the Lewiston Morning Tribune that he had lied under oath at Mark's trial and that it had been he who had bludgeoned the Bravences, that he used a rock and that Mark Lankford was not present at the scene. Later, at Mark Lankford's motion for a new trial, Bryan Lankford indicated that he had lied to the Lewiston Tribune. Finally, after being sentenced to death, Bryan Lankford executed a written statement in which he indicated his full culpability for the Bravence deaths and Mark's [sic] Lankford's innocence. Then on May 29, 1986, at Mark's second motion for a new trial, Bryan testified that he was primarily responsible for the murders. He further testified that his testimony at his brother's trial was false.

On October 15, 1984, the court issued its Findings in Consideration of the Death Penalty. Judgment and sentence of Death was imposed on October 16, 1984.

I.

Lankford's Decision to Waive His Right to Counsel and Cross-examine His Brother Pro Se.

Mark Lankford claims that he was deprived of his right to counsel as guaranteed by the sixth and fourteenth amendments to the United States Constitution and art. 1, § 13 of the Idaho Constitution when the trial court allowed him to cross-examine his brother pro se. He claims that Idaho case law, *Bement v. State,* 91 Idaho 388, 395, 422 P.2d 55 (1966), and I.C. § 19-857 (1987), mandate that

more than a mere affirmative waiver is needed to show that the defendant knowingly and intelligently waived his right to counsel. Lankford claims that the trial court did not conduct the requisite penetrating and extensive examination into all of the circumstances of Lankford's waiver; and, as a result, he was allowed to waive his right to counsel in the heat of passion and without sufficient knowledge of his waiver's potential ramifications.

Criminal defendants have the right to be represented by counsel as guaranteed by the sixth and fourteenth amendments of the United States Constitution and art. I, § 13 of the Idaho Constitution. In addition to guaranteeing the right to counsel, it has been held that the sixth amendment guarantees that a defendant has an independent constitutional right to proceed pro se when he voluntarily and intelligently elects to do so. *Faretta v. California,* 422 U.S. 806, 812-836, 95 S.Ct. 2525, 2529-2542, 45 L.Ed.2d 562 (1975); *United States v. Harris,* 683 F.2d 322, 324-325 (9th Cir.1982) (the *Harris* court found that the defendant must be aware of the nature of the charges filed against him and the possible penalties flowing from those charges, as well as the dangers and disadvantages of self representation. The *Harris* court also held that the trial court must discuss with the defendant, in open court, whether the defendant's waiver was knowingly and intelligently made, with an understanding of the charges, and possible penalties and dangers of self representation.) *See State v. McCabe,* 101 Idaho 727, 729, 620 P.2d 300 (1980), in which this Court cites *Faretta.*

Ultimately, the decision of whether to exercise the right to counsel or proceed pro se is for the defendant to make. The role of the trial court is simply to ensure that

where the defendant waives the right to counsel he or she does so knowingly and intelligently.

In this case, the trial court went to great lengths to ensure that Mark Lankford's waiver of his right to counsel was made knowingly and intelligently, and to dissuade Lankford from proceeding pro se. The trial court warned him of the hazards he would encounter, that he had an insufficient background to examine the witnesses, and that he would be held to the Rules of Evidence if he elected to proceed on his own behalf. In spite of these warnings, Lankford insisted on waiving his right to counsel and proceeded pro se during the cross-examination of his brother. In response to Lankford's insistence, the trial court did the only thing it could do-it granted his wish. Even though the trial court allowed Lankford to proceed pro se, the record reflects the court still protected him as much as it could under the circumstances. It allowed Lankford's counsel to remain present during Lankford's pro se activities; it assisted him on procedural points during his attempt at cross-examination; and finally, it allowed Lankford's attorney to go through an entire recross-examination after Lankford terminated his botched attempt.

We affirm the trial court on this issue.

II.

The Trial Court's Instruction That Malice Could Be Established by Proof That the Killing Took Place During the Perpetration or Attempted Perpetration of a Robbery.

Lankford argues that the giving of Instruction No. 24(a) was reversible error. The instruction reads:

> The term malice does not necessarily import ill will toward the individual injured, but signifies rather a general malignant recklessness toward the lives and safety of others. Malice may be shown from the fact that an unlawful killing took place during the perpetration or attempted perpetration of the crime of robbery.

Lankford claims that this instruction was incorrect in two respects. First, he argues that it states as a matter of law that a killing in perpetration or attempted perpetration of a felony is malice *per se*. Second, he argues the jury could have reasonably interpreted the instruction as creating a presumption that a robbery was committed, thus, relieving the State of its burden of proving beyond a reasonable doubt the existence of a robbery.

As to Lankford's argument that the second sentence of Instruction 24-A misstates the law or is incorrect, we must disagree based upon our reading of Idaho's requirements for the proof of murder in the first degree.

Idaho Code § 18-4001 (1987) provides in part:

> 18-4001. Murder defined. – Murder is the unlawful killing of a human being with malice aforethought. . . .

Idaho Code § 18-4002 (1987) provides that "such malice may be express or implied." In addition, I.C. § 18-4003(d) (1987) provides:

> 18-4003(d). Any murder committed in the perpetration of, or attempt to perpetrate arson, rape, robbery, burglary, kidnapping and mayhem is murder of the first degree.

Thus, the proof of a murder in the first degree is established in all of its elements by proving (a) the unlawful killing of a human being (b) in the course of a robbery. The requirement of "malice aforethought" is satisfied by the fact the killing was committed in the perpetration of a robbery. In W. La Fave and A. Scott, Jr., *Criminal Law,* § 67 Murder-"Malice Aforethought" and "Living Human Being," pp. 528-530, and § 7 Felony Murder, pp. 545-547 and 554 (1972), the authors explain:

> Murder is a common law crime whose complete development required several centuries. Though murder is frequently defined as the unlawful killing of another "living human being" with "malice aforethought," in modern times the latter phrase does not even approximate its literal meaning. Hence it is preferable not to rely upon that misleading expression for an understanding of murder but rather to consider the various types of murder (typed according to the mental element) which the common law came to recognize and which exist today in most jurisdictions:
>
> (1) intent-to-kill murder;
>
> (2) intent-to-do-serious-bodily-injury murder;
>
> (3) depraved-heart murder; and
>
> (4) felony murder.
>
> . . . .
>
> At first the judges in fact did require for murder that the defendant actually have a previously thought-out (*i.e.*, premeditated) intent to kill, though probably the spite, etc., was never actually necessary. Later (about 1550), English statutes made it murder to intentionally kill another

by poisoning or by lying in wait; but these two situations would seem to be no more than typical cases involving a premeditated intent to kill, the almost literal meaning of "malice aforethought."

. . . . .

Thereafter the judges started to invent some new types of murder where there existed no premeditated intent to kill. First of all, when the defendant intentionally killed his victim in a heat of passion aroused in him by the conduct of the victim – the issue being whether the defendant should be guilty of murder or of voluntary manslaughter – the judges decided that manslaughter required that the defendant's passion be reasonable.

. . . . .

Secondly, when the defendant unintentionally killed another person in the commission of a felony – as where A set fire to B's house (arson) and accidentally B or a member of his family was burned to death – the judges held this to be murder ("felony murder"), though the defendant did not intend to kill at all and a fortiori did not premeditate a killing.

. . . .

The judges still continued to say that murder is committed by one who unlawfully kills another "with malice aforethought," now however adding the phrase "express or implied," the word "implied" covering the four situations just described wherein literally there exists no premeditated intent to kill. Modern courts and legislatures still frequently define murder in terms of "malice aforethought, express or implied," by which they

> mean the same types of murder as those which the English judges ultimately recognized, including felony murder, depraved-heart murder, intent-to-do-serious-bodily-injury murder and murder committed in an unreasonable passion. (The foregoing history is contained in N.Y.State Law Revision Commission, Communication to the Legislature, Legislative Doc. No. 65, 536-540 (1937), reprinted in Hall & Glueck, Criminal Law & Its Enforcement 37-39 (2d ed. 1958). *See also* Moreland, The Law of Homicide chs. 1-3 (1952); 1 Stephen, A History of the Criminal Law of England (1883).)[1]

Under the facts of the instant case, according to Idaho law, the robbery not only supplies the malice element of the murder charge, but also it makes that murder a murder in the first degree as defined in I.C. § 18-4003(d). Therefore, the instruction was not in error.

As for Lankford's second assignment of error on this instruction, we note that jury instructions must be considered together, without particular weight being given to one as opposed to the others. *State v. Bryan Lankford,* 113 Idaho 688, 694, 747 P.2d 710 (1987). The trial court instructed the jury that the State must prove all elements for crimes charged beyond a reasonable doubt. This defeats Lankford's argument that under Instruction 24(a) the State was not sufficiently obligated to prove robbery beyond a reasonable doubt because the jury was instructed that robbery had to be proven beyond a reasonable doubt. *See State v. Golden,* 67 Idaho 497, 502, 186 P.2d 485 (1947). Because Instruction 24(a) was a correct statement

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[1] *See* I.C. § 18-4002.

of the law of first degree murder in Idaho and because the court did instruct the jury that it would have to find all the elements of the crimes charged proven beyond a reasonable doubt, we find no error in the language of Instruction 24(a).

III.

The Trial Court's Decision to Add to the State's List of Aggravating Circumstances and to Deny Lankford's Motion For Continuance.

Lankford claims that the trial court abused its discretion and interfered with his right to counsel when it denied his motion for a continuance to prepare for previously undisclosed aggravating factors which the trial court added to the prosecution's proposed list of factors. The two factors added were factors enumerated in I.C. § 19-2515(g)(2) (commission of multiple murders) and I.C. § 19-2515(g)(7) (felony murder accompanied with the specific intent to cause the death of a human being).

While a decision to grant or deny a continuance generally rests within the discretion of the trial judge, the discretion is abused when it results in the abridgment of the accused's right to counsel. *State v. Brown,* 98 Idaho 209, 560 P.2d 880 (1977). In essence, Lankford's argument is that defense counsel had no prior notice that the trial court was going to add two aggravating factors to the list presented by the prosecutor and that lack of notice, combined with the trial court's denial of his motion for a continuance, effectively abridged Lankford's right to counsel, thereby violating his rights under the sixth amendment to the United States Constitution and his rights under art. I, § 13 of the Idaho Constitution. Since

the Idaho statute supplies the two subject aggravating factors, the district judge was required to give them consideration if circumstances were proven to support them.

This Court has acknowledged that I.C. § 19-2515(f) (1987) gives fully sufficient notice of the circumstances under which the death penalty may be imposed and of the prerequisites governing such sentence. *State v. Bryan Lankford,* 113 Idaho 688, 747 P.2d 710 (1987). *See also Lockett v. Ohio,* 438 U.S. 586, 597, 98 S.Ct. 2954, 2961, 57 L.Ed.2d 973 (1978) (wherein the court held that a statute gives fair warning of capital liability for an aider and abettor); and *Dobbert v. Florida,* 432 U.S. 282, 298, 97 S.Ct. 2290, 2300, 53 L.Ed.2d 344 (1977), wherein the court held that the existence [of a death penalty statute] on the statute books provides fair warning as to the degree of culpability which the state ascribes to the act of murder). In light of both Idaho and United States Supreme Court rulings, the fact that the aggravating circumstances are documented in I.C. § 19-2515(f) provided Lankford with the requisite notice.

Not only do the statutes provide sufficient notice of aggravating circumstances, but Idaho's sentencing system provides that the judge, not the prosecuting attorney, is responsible for sentencing. *State v. Bryan Lankford,* 113 Idaho 688, 747 P.2d 710, *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983) *cert. den.,* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). Because Idaho provides for judge sentencing, a prosecuting attorney's sentencing recommendations are to be viewed as just that, mere recommendations. The trial judge makes the final decision as to what will be and will not be considered in sentencing. Finally, I.C. § 19-2515(d) provides that

"[e]vidence admitted at trial shall be considered and need not be repeated at the sentencing hearing."

Lankford had notice of all possible aggravating circumstances and that the judge could properly utilize any or all of them during sentencing. Thus, we find no error and affirm the trial court on this issue.

IV.

Sentencing – Participation of Jury.

Lankford asserts that the imposition of the death penalty with no participation by the jury in the sentencing process violates the Idaho Constitution.

In *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299 (1989), this Court ruled:

> In 1983 this Court held "that there is no federal constitutional requirement of jury participation in the sentencing process and that the decision to have jury participation in the sentencing process, as contrasted with judicial discretion sentencing, is within the policy determination of the individual states." *State v. Creech,* 105 Idaho 362, 373, 670 P.2d 463, 474 (1983) *cert. den.* 465 U.S. 1051, 104 S.Ct. 1327, 79 L.Ed.2d 722 (1984). *See also State v. Sivak,* 105 Idaho 900, 902, 674 P.2d 396, 398 (1983) *cert. den.* 468 U.S. 1220, 104 S.Ct. 3591, 82 L.Ed.2d 887, (1984); *State v. Fetterly,* 109 Idaho 766, 710 P.2d 1202 (1985) *cert. den.,* 479 U.S. 870, 107 S.Ct. 239, 93 L.Ed.2d 164 (1986); *State v. Fain,* [116 Idaho 82, 774 P.2d 252 (1989)]. In 1984 the United States Supreme Court upheld death sentencing by trial judges. *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984).

This Court has also held "that Art. 1, § 7, of the Idaho Constitution does not require the participation of a jury in the sentencing process in a capital case." *Sivak,* 105 Idaho at 904, 674 P.2d at 400. *See also Fain,* [116 Idaho 82, 774 P.2d 252] (1989).

Jaimi [Charboneau] contends that despite these decisions, since I.C. § 19-2515(g) "links an enhanced punishment to specific enumerated factual findings," it "usurps the jury's fundamental role in deciding whether the fact is so." In *Richmond v. Arizona,* 434 U.S. 1323, 98 S.Ct. 8, 54 L.Ed.2d 34 (1977) Justice Rehnquist, sitting as a circuit justice, denied an application for suspension of an order denying certiorari or, in the alternative, for a stay of execution. In his opinion Justice Rehnquist stated:

Applicant raises a second argument in his petition for rehearing that was not raised either before the Arizona Supreme Court or in his earlier petition for certiorari. Applicant argues that the Arizona statute violates the Sixth, Eighth, and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in *Proffitt* [*v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976)].

434 U.S. at 1325, 98 U.S. at 9, 54 L.Ed.2d at 36. Jaimi correctly points out that this issue was not presented to the entire Supreme Court, but only to Justice Rehnquist. Jaimi argues that *McMillan v. Pennsylvania,* 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986) supports his position on this issue. It is interesting that Justice

Rehnquist also wrote the opinion for the Court in *McMillan,* including the statement "that there is no Sixth Amendment right to jury sentencing, even where the sentence turns on specific findings of fact." 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. In his decision Justice Rehnquist cited *Proffitt* for the proposition: "Sentencing courts necessarily consider the circumstances of an offense in selecting the appropriate punishment, and we have consistently approved sentencing schemes that mandate consideration of facts related to the crime,. . . . " 477 U.S. at 88, 106 S.Ct. at 2420, 91 L.Ed.2d at 76. The crux of the decision in *McMillan* was the conclusion that the fact at issue there – visible possession of a firearm – was not an element of the crimes for which the defendants were convicted, but were instead "a sentencing factor that comes into play only after the defendant has been found guilty. . . . " *McMillan,* 477 U.S. at 84, 106 S.Ct. at 2416, 91 L.Ed.2d at 72. That is how we view the aggravating circumstances listed in I.C. § 19-2515(g).

To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder. It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

Our opinion in this aspect of the case is not changed by the decision of the Ninth Circuit in

Adamson v. Ricketts, 865 F.2d 1011 (9th Cir.1988). In *Adamson* the Ninth Circuit held Arizona's death penalty sentencing statutes to be in violation of the sixth amendment. During reargument of this case to determine what impact *Adamson* might have on our opinion here, the solicitor general for the state of Idaho acknowledged that there is no significant difference between the Arizona death penalty sentencing statutes and those of Idaho. Nevertheless, we are not convinced that *Adamson* correctly states the requirements of the sixth amendment on this issue.

Judicial sentencing in capital cases does not violate the sixth amendment. *Spaziano v. Florida,* 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). *Adamson* attempts to distinguish *Spaziano* on the ground that in *Spaziano* "the Court never reached the particular contention *Adamson* has raised: that Arizona's capital sentencing statute requires the judge to determine elements of the offense charged, thereby taking this factual element out of the jury's hands in violation of the Sixth Amendment." 865 F.2d at 1028. We disagree.

In *Spaziano* the Court noted that the Florida capital sentencing statute that was at issue directed the sentencing judge "to determine whether statutory aggravating circumstances were outweighed by statutory mitigating circumstances." 468 U.S. at 450 n. 4, 104 S.Ct. at 3157 n. 4, 82 L.Ed.2d at 343 n. 4. The Florida statute was similar in the important aspects to those portions of I.C. § 19-2515 relating to death penalty sentencing. The Florida statute provided that the sentencing judge should weigh the aggravating and mitigating circumstances. If the

judge imposed a sentence of death, the judge was required to set forth in writing "findings upon which the sentence of death is based as to the facts: (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and (6) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances." 1972 Fla.Laws, ch. 72-724, Sec. 921.141(3)(b). The aggravating circumstances enumerated in the Florida law at issue in *Spaziano* were similar in some respects to those contained in I.C. § 19-2515(g). Significantly, one of the aggravating circumstances in Florida was: "The capital felony was especially heinous, atrocious, or cruel." 1972 Fla.Laws, ch. 72-724, Sec. 921.141(6)(h). This is substantially the same as I.C. § 19-2515(g)(5) that is at issue here, except that our statute adds the qualifying phrase, "manifesting exceptional depravity."

The Florida Supreme Court noted in its decision "the trial judge found that the circumstances of the offense were especially heinous, atrocious, and cruel, and secondly, found that the defendant was previously convicted of felonies involving the use or threat of violence to the person." *Spaziano v. State,* 393 So.2d 1119 (Fla.1981). On certiorari the United States Supreme Court held:

The fact that a capital sentencing is like a trial in the respects significant to the Double Jeopardy Clause, however, does not mean that it is like a trial in respects significant to the Sixth Amendment's guarantee of a jury trial. . . . The sentencer, whether judge or jury, has a constitutional obligation to evaluate the unique circumstances of the individual defendant and the sentencer's decision for life is final. *Arizona v. Rumsey,* [467 U.S. 203, 104 S.Ct. 2305, 81

> L.Ed.2d 164 (1984)]. More important, despite its unique aspects, a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual. [Citations omitted, except] *Williams v. New York,* 337 U.S. 241, 247-249, 69 S.Ct. 1079, 1083-1084, 93 L.Ed. 1337 (1949). The Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue.
>
> 468 U.S. at 454, 104 S.Ct. at 3161, 82 L.Ed.2d at 347. These comments were made by the Court in considering death penalty sentencing by a judge under a statute substantially similar to our statute and with findings of aggravating circumstances similar to those here. This convinces us that the Court inherently considered and rejected the premise of the Ninth Circuit in *Adamson*: that a capital sentencing statute that requires the judge to determine aggravating circumstances takes this factual element out of the jury's hands in violation of the sixth amendment.

116 Idaho at 145-147, 774 P.2d at 315-317.

For the reasons enunciated in *Charboneau,* we hold that Lankford was not entitled to jury participation in the sentencing process.[2] Our position is strengthened by the United States Supreme Court's recent opinion in *Hildwin v. Florida,* 490 U.S. 638, 109 S.Ct. 2055, 104 L.Ed.2d 728 (1989) where the Court concluded that "the

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[2] Justice Huntley dissents from this Part IV and adopts his dissent in Charboneau, appended hereto as Appendix A, as his dissent in this case.

Sixth Amendment does not require that the specific findings authorizing the imposition of the sentence of death be made by the jury."

V.

The testimony of the Court Appointed Psychiatrist.

Lankford claims that the court violated his rights guaranteed by the fifth and fourteenth amendments to the United States Constitution and Article 1, § 13 of the Idaho Constitution when it compelled him to be a witness against himself at a psychiatric examination conducted by Dr. Estes. Lankford also claims that the court's order subjected him to the psychiatric examination without assistance of counsel, thus, violating his sixth and fourteenth amendment rights under the United States Constitution, and his rights under Article 1, § 13 of the Idaho Constitution.

On May 17, 1984, the district court ordered Dr. Estes, a psychiatrist, to examine Mark Lankford and report upon his psychiatric medical condition. Dr. Estes followed the court order and questioned Lankford in the Ada County Jail. Lankford's attorney was not present during the questioning. Following his examination of Lankford, Dr. Estes submitted his findings to the court. Later he testified as to those findings at the sentencing hearing. Dr. Estes testified that, prior to interviewing Lankford, he orally administered the Miranda Rights. Dr. Estes did not obtain a written waiver of Lankford's Miranda rights nor did he inform Lankford that his statements would be used as evidence in proving the aggravating circumstances necessary for the death penalty. Dr. Estes did advise Lankford that their conversation would not be subject to

any doctor/patient privilege. Prior to allowing Dr. Estes to testify about his interview with Lankford, the trial court questioned Dr. Estes to assure that disclosure of the interview would pass constitutional muster. The court found that the examination took place with the consent and approval of counsel, after written notice to counsel, and that Lankford's comments to the psychiatrist were made voluntarily, with knowledge of his right to remain silent, and with knowledge that any statements he made could be used against him.

The fifth amendment privilege against self-incrimination and the sixth amendment right to counsel apply to custodial psychiatric exams conducted prior to sentencing as well as those conducted prior to trial. Adequate protection of these rights requires that the examining psychiatrist Mirandize the patient. *Estelle v. Smith,* 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981). In Estelle, after the State announced its intention to seek the death penalty, the trial court ordered a psychiatric examination to determine Estelle's competency to stand trial. The examination was conducted in the jail where he was being held. The examining doctor determined that Estelle was competent to stand trial and he was then tried and convicted. A separate sentencing proceeding was then held before a jury, as required by Texas law. The doctor who had conducted the pre-trial psychiatric examination testified for the State. The jury determined that the death penalty should be imposed. The case ultimately made its way to the federal district court by writ of habeas corpus where the death sentence was vacated because the court found constitutional error in admitting the doctor's testimony at the penalty phase. The United States Court of Appeals

affirmed. The case was then appealed to United States Supreme Court which affirmed. The Court stated:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict *and punish* an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *Culombe v. Connecticut,* 367 U.S. 568, 581-582, 81 S.Ct. 1860, 1867, 6 L.Ed.2d 1037 (1961) (opinion announcing the judgment) (emphasis added). *See also Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55, 84 S.Ct. 1594, 1596-1597, 12 L.Ed.2d 678 (1964); E. Griswold, The Fifth Amendment Today 7 (1955).
>
> The Court has held that "the availability of the [Fifth Amendment] privilege does not turn upon the type of proceeding in which its protection is invoked, but upon the nature of the statement or admission and the exposure which it invites." *In re Gault,* 387 U.S. 1, 49, 87 S.Ct. 1428, 1455, 18 L.Ed.2d 527 (1967). In this case, the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist. Just as the Fifth Amendment prevents a criminal defendant from being made "'the deluded instrument of his own conviction,'" *Culombe v. Connecticut, supra,* [367 U.S.] at 581, [81 S.Ct. at] 1867, quoting 2 Hawkins, Pleas of the Crown 595 (8th ed. 1824), it protects him as well from being made the "deluded instrument" of his own execution.

> We can discern no basis to distinguish between the guilt and penalty phases of respondent's capital murder trial so far as the protection of the Fifth Amendment privilege is concerned. (Footnote omitted.) Given the gravity of the decision to be made at the penalty phase, the State is not relieved of the obligation to observe fundamental constitutional guarantees.

Estelle v. Smith, 451 U.S. at 462-463, 101 S.Ct. at 1872-1873.

As for the method of advising a suspect or defendant of his Miranda Rights, and of obtaining a waiver of those rights, there is no requirement that either be done in writing. The U.S. Constitution does not require a written warning or waiver, and Idaho has not required a written warning or waiver since such requirements were removed from I.C. § 19-853 in 1984. Accordingly, Dr. Estes did not violate Lankford's constitutional rights when he orally advised Lankford of his Miranda Rights and accepted an oral waiver. Since Lankford was properly Mirandized and there was no formalistic infirmity with his waiver, the only question which remains is whether Lankford's waiver was voluntary, knowing and intelligent. Lankford claims that his waiver was not voluntary, knowing and intelligent because Dr. Estes did not tell him that his disclosures could be used as evidence for the State during sentencing. We disagree. The very fact that he was Mirandized put Lankford on notice that what he said could be used against him during the sentencing hearing. This notice was furthered when Dr. Estes told Lankford that the doctor/patient privilege would not apply to Lankford's disclosures. Additionally, Lankford's attorney was involved in this process. The court sent defense counsel written notice of the court ordered psychiatric examination prior

to the time it was conducted, and informed defense counsel that there was reason to believe that Lankford's mental condition would be a significant factor at sentencing. Defense counsel did not object at this point. A factor to be noted, although it is not pivotal to the outcome, is that Dr. Estes' testimony is not alleged to have presented the court with any new facts about the commission of the crime – rather the new material dealt only with psychological opinion testimony.

Because Lankford was properly informed of his rights and he voluntarily, knowingly and intelligently waived those rights and because Lankford's attorney knew that the psychiatric examination was going to take place, the court did not err in admitting Dr. Estes [sic] psychiatric testimony at the sentencing hearing.

VI.

The Trial Court's Denial of Lankford's Second Motion for New Trial.

Lankford next argues that the trial court erred when it denied his second motion for new trial which was based upon newly discovered evidence and the recanted testimony of the State's key witness, Bryan Lankford.

The newly discovered evidence was a letter written by Bryan Lankford, which disclosed that he had lied when he testified that Mark had committed the murders, and that it had actually been he who committed the murders. The recantation of testimony occurred at the evidentiary hearing on Mark's second motion for new trial; Bryan testified that he had lied at Mark's trial and that his brother was not involved in the actual killings.

Mark Lankford now argues that whether this Court applies the test for granting a new trial based on newly discovered evidence or the test for granting a new trial based on recanted testimony, a new trial should be granted because the only direct evidence that linked Mark Lankford with the Bravences' murders was Bryan Lankford's original trial testimony.

We note from the outset that while the decision of whether to grant a new trial is a discretionary matter for the trial judge. Idaho Code § 19-2406(7) (1987), limits the instances in which that discretion may be exercised.[3]

Idaho Criminal Rule 34, New Trial, states in part: "The court on motion of a defendant may grant a new trial to him if required in the interest of justice." This Court, in *State v. Scroggins,* 110 Idaho 380, 384, 716 P.2d 1152 (1986) stated:

> The question of whether the interest of justice requires a new trial under the circumstances of a

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[3] The portion of this code section relevant to the case at bar reads:

19-2406. Grounds for new trial. – When a verdict has been rendered against the defendant the court may, upon his application, grant a new trial in the following cases only:

. . . .

7. When new evidence is discovered material to the defendant, and which he could not with reasonable diligence have discovered and produced at trial. When a motion for a new trial is made upon the ground of newly-discovered evidence, the defendant must produce at the hearing in support thereof the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits the court may postpone the hearing of the motion for such length of time as, under all the circumstances of the case, may seem reasonable.

> particular case is directed to the sound discretion of the trial court; and the trial court's decision thereon will not be disturbed absent an abuse of that discretion. (Citation omitted.)

Although I.C. § 19-2406 does not specifically address new trials on the basis of recanted testimony as opposed to the discovery of new evidence, the apparent intent of the legislature and opinions rendered by this Court exemplify the fact that recanted testimony is a form of new evidence and is thus covered by subsection (7). The trial judge does not abuse his or her discretion unless a new trial is granted for a reason that is not delineated in the code or unless the decision to grant or deny a new trial is manifestly contrary to the interests of justice.

As the Idaho Court of Appeals noted in *State v. Lawrence,* 112 Idaho 149, 730 P.2d 1069 (Ct.App.1986), there are two different judicial approaches to determining whether the interests of justice require that a new trial be granted on the basis of recanted testimony.

> One approach has been to treat the recantation as a form of newly discovered evidence. When a new trial is sought upon such evidence, the moving party must satisfy what has become known as the "Berry" test. This multi-part test, named after the case of *Berry v. State,* 10 Georgia 511 (1851), includes the requirement that the new evidence probably would produce a different result. *Berry* has been adopted in substance by most state and federal courts. 3 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 557 (2d Ed.1982) (hereinafter WRIGHT). It was approved by our Supreme Court in *State v. Drapeau,* 97 Idaho 685, 551 P.2d 972 (1976).

A second approach has been to treat recanted testimony as a problem distinct from newly discovered evidence. Perjured testimony affects the integrity of the judicial process in a way that overlooked evidence does not. WRIGHT, § 557.1. Moreover, while a rigorous standard for obtaining a second trial upon new evidence may be justified as an incentive for the parties to marshal evidence and to present it at the first trial, the parties need no such incentive to combat perjury. The seminal decision establishing a distinct test for recanted testimony is *Larrison v. United States,* 24 F.2d 82 (7th Cir.1928). There, as in the present case, a government witness announced after trial that he had given false testimony. The *Larrison* court held that a new trial should be granted when (a) "[t]he court is reasonably well satisfied that the testimony given by a material witness is false," (b) "[t]hat without it the jury might have reached a different conclusion," and (c) "[t]hat the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." (Emphasis original.) (Footnote omitted.)

Those courts which fail to discern any functional difference between the recantation of trial testimony and the discovery of new evidence after trial applied the *Berry* test in both situations. *E.g., United States v. Krasny,* 607 F.2d 840 (9th Cir.1979) *cert. den.,* 445 U.S. 942, 100 S.Ct. 1337, 63 L.Ed.2d 775 (1980). However, most courts now apply the *Larrison* test to recanted testimony. *E.g., United States v. Stofsky,* 527 F.2d 237 (2d Cir.1975), *cert. den.* 429 U.S. 819, 97 S.Ct. 65, 66, 50 L.Ed.2d 80 (1976); *see generally* WRIGHT, § 557.1.

> In Idaho, the relationship between *Berry* and *Larrison* has not been explored thoroughly. However, our Supreme court [sic], without mentioning *Berry* or its adoption in *Drapeau,* has cited *Larrison* with approval. In *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1986), the Supreme Court explicitly noted *Larrison's* three elements. The court then reformulated *Larrison* as follows:
>
> [U]nder the holding of *Larrison,* it would seem that in appropriate circumstances, where a defendant submits an affidavit by a government witness in which the witness recants his testimony and specifies in what ways he dishonestly testified and in what ways he would, if given the opportunity to testify again, change that testimony and where a defendant makes a showing that such changed testimony *may be material* to a finding of his guilt or innocence, a new trial should be held.
>
> 110 Idaho at 385, 716 P.2d at 1157 (emphasis added).

Lawrence, 112 Idaho at 151-152, 730 P.2d 1071-1072.

In the instant case, the trial court, upon consideration of substantial competent evidence, determined that the original testimony was correct and that the recantation was not believable. The trial court, as part of exhaustive findings and opinion on this issue, noted in part:

> It is very crucial to note that Bryan Lankford's recantation of his trial testimony was made under circumstances which raise a grave doubt as to its reliability.
>
> . . . .

> Based upon a review of the files and records herein as well as a consideration of the testimony given by Bryan Lankford at Defendant's second motion for a new trial, this Court is reasonably well satisfied that the testimony given by Bryan Lankford at the second motion for a new trial was false and furthermore that the testimony given by Bryan Lankford at the Defendant's trial concerning the participation of the Defendant in the killing of the Bravences was true.
>
> It is the opinion of this Court that it *cannot* be said that the recantation reasonably could affect the outcome of the trial. Furthermore, this Court does not conclude that evidence of the recantation would probably produce a different verdict. Finally, and based upon the foregoing, the recantation evidence does not, in the interests of justice, require that a new trial be granted.

Thus, our inquiry need go no further since the record demonstrates no manifest abuse of discretion in the trial court's denial of a new trial.

VII.

Imposition of the Death Sentence.

Lankford claims that the trial court imposed the death penalty arbitrarily and under the influence of passion and prejudice in direct contradiction of the strictures of I.C. § 19-2827(c)(1).

A. Legal Principles.

We begin our analysis of Lankford's claims by noting the following points of law. The right to due process requires an impartial trial judge. *Lopez v. Vanderwater,*

620 F.2d 1229, 1235 (7th Cir.1980). A judge may not be disqualified for prejudice unless it is shown that the prejudice is "a prejudice that is directed against the party litigant, and is of such nature and character as would render it improbable that the party could have a fair and impartial trial in the particular case pending." *Bell v. Bell,* 18 Idaho 636, 641, 111 P. 1074 (1910); *State v. Waterman,* 36 Idaho 259, 210 P. 208 (1922). The district court may properly participate in the examination of witnesses for the purpose of "clarifying the evidence, controlling the orderly presentation of the evidence, confining counsel to evidentiary rulings, and preventing undue repetition of testimony." *United States v. Allsup,* 566 F.2d 68, 72 (9th Cir.1977) (quoting *United States v. Malcolm,* 475 F.2d 420, 427 (9th Cir.1973)). However, prosecutorial acts by the trial judge may be violative of the defendant's constitutional rights.

B. Analysis.

The following are the specific post-trial events Lankford claims evidence the trial judge's prejudicial attitude, his abandonment of his judicial role. We analyze each in turn.

1. The trial court referred to Defendant's Motion for New Trial, formal sentencing and jury determination of sentencing as *petty* motions.

This problem has been adequately explained as being caused by an error in the transcription of the record. The court reporter mistook the word "pending" for "petty."

2. The trial court called the prosecutor as a witness in support of the state's position at Defendant's first Motion for New Trial hearing.

Neither this allegation nor the record indicate that this was a prosecutorial or prejudicial act by the trial judge. Lankford appears to be asking that this Court infer that this was a prosecutorial action by the trial court evidencing bias. However, the record establishes that the trial court acted in the interest of clarifying testimony.

3. The trial court permitted the testimony of Dr. Estes as a court witness even though the state did not list him as a potential witness.

Contrary to Lankford's allegation, defense counsel had ample notice that Dr. Estes might testify. Furthermore, the record does not establish that the trial court had any prior knowledge as to which party would be benefited by the testimony. We find no error on this point.

4. The trial court asked questions of Dr. Estes at sentencing in order to provide the foundation for introduction of his report.

The trial court's questions were proper and designed to ensure that the expert's testimony was admissible. Thus, these questions were actually asked for the protection of Lankford's rights. It should be noted that the trial judge asked Dr. Estes these questions at the sentencing hearing, not during trial. Because of this, there was no danger of interfering with the jury's determination of the case, and it was important that the judge (in addition to securing Lankford's constitutional rights), properly acquire the information necessary for sentencing. This was done without error.

5. The trial court supplemented the list of aggravating factors to be considered at sentencing *sua sponte* and refused to grant a continuance to meet the court imposed factors.

The appropriateness of the court considering the two additional aggravating factors is fully discussed herein in Section III, *supra*. Those aggravating factors were part and parcel of the crimes charged and the trial court's sua sponte listing of them for consideration is not evidence of a prejudicial attitude but rather constitutes the trial court's proper performance of its statutory duties.

6. The trial court sought to cross-examine Bryan Lankford at the second Motion for New Trial despite lengthy examinations by both parties. Failing to get a desired response, the district court struck the testimony of Bryan Lankford.

It is unfair to say that the trial court "sought to cross-examine" Bryan Lankford at the second motion for new trial. The court simply asked Bryan Lankford questions for the purpose of clarification. This was absolutely proper. As stated above, the granting of a new trial is a discretionary decision made by the trial judge. In a situation where a defendant requests a new trial because of recanted testimony, the trial court must be satisfied that the original testimony was false and that the new testimony is true if the judge is to grant a new trial. Accordingly, it is vital that the trial judge be allowed to ask questions for clarification and for the gathering of information during a hearing on a motion for new trial. The court did not err in interrogating Bryan Lankford or in striking his testimony.

7. The trial court examined several witnesses at the Second Motion for New Trial hearing in an attempt to elicit testimony favorable to the State's position.

Upon reviewing the record we are not convinced that the purpose of the trial court's examination of witnesses was an attempt to elicit testimony favorable to the State's position. However, even if the motivation alleged by Lankford were true, Lankford failed to specify the exact incidents of this alleged misconduct. As a result, he asks us to do what defense counsel said in its brief we cannot do, "look into Judge Reinhardt's heart and mind to see if he was prejudiced toward the defendant or enflamed by the circumstances of the crime." We find this allegation without merit.

8. The trial court suggested witnesses and motions to the state at the Second Motion for New Trial hearing.

In this allegation defense counsel once again fails to identify specific points in the record to support this general allegation. Furthermore, Lankford fails to argue or establish that any prejudice resulted from these suggestions if in fact they were made.

VIII.

Aggravating Circumstances.

Lankford makes two arguments pertaining to the aggravating circumstances. First, Lankford argues that the aggravating circumstances set forth in I.C. § 19-2515 are unconstitutionally void for vagueness. Lankford's second argument is that even if the aggravating factors are constitutional and applicable, there was not sufficient

evidence to support a finding of their existence in this case.

A.

Constitutionality of Aggravating Circumstances

Lankford asserts that the aggravating factor that "their murder was especially heinous, atrocious or cruel, manifesting exceptional depravity," is unconstitutional under *Maynard v. Cartwright,* 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988). In *Maynard,* the U.S. Supreme Court held that the aggravating circumstance of an Oklahoma death penalty statute which referred to especially heinous, atrocious or cruel murders was unconstitutionally vague pursuant to the Eighth Amendment to the United States Constitution. The Court reasoned that these aggravating factors failed to adequately inform the sentencer of what must be found in order to impose the death penalty and thereby left the sentencer with the ability to impose the death penalty in an arbitrary and capricious manner.

There is, however, an important distinction between the Oklahoma and Idaho aggravating circumstance statutes. The distinction is that Oklahoma has jury sentencing while Idaho adheres to judicial sentencing in capital murder cases. These aggravating circumstances are terms of art that are commonly understood among the members of the judiciary. As a result, the potential for inconsistent application that exists as a result of jury sentencing is eliminated where the judge sentences.

B.

Sufficiency of the Evidence

Lankford asserts that there was insufficient evidence to support three of the trial court's findings of statutory aggravating factors. He argues that: (1) there is insufficient evidence to support the finding that he had a propensity to commit murder and was a continuing threat to society; (2) that there was insufficient evidence of heinous, atrocious or cruel acts manifesting exceptional depravity to set this apart from other first degree murders in which the death penalty was not imposed; and (3) that there was insufficient evidence to support the court's finding that the murders exhibited an utter disregard for human life as set forth in *State v. Osborn,* 102 Idaho 405, 419, 631 P.2d 187 (1981).

The evidence was sufficient to support the aforementioned statutory aggravating factors.

1. Doctor Estes' testimony that Lankford was an aggressive anti-social personality prone to violence combined with the fact that Lankford was convicted of two murders lends sufficient support to the trial court's finding that he had a propensity for violence and to commit murder.

2. The brutal manner in which Lankford bludgeoned the skulls of his two victims clearly supports the trial court's finding that the murders were especially heinous, atrocious or cruel manifesting exceptional depravity.

3. The manner in which the Bravences were brutally murdered together with the fact that they were killed for the mere reason that the Lankfords wanted to steal their

van support the court's finding that the murders were committed with utter disregard for human life.

The record establishes that the aggravating factors were properly utilized by the court and that there was sufficient evidence to support the trial court's findings.

IX.

Proportionality of the Death Sentence.

The final argument Lankford raises on appeal is that the death sentence is disproportionate when compared to other cases in which the death penalty was or was not imposed. Lankford brings this argument pursuant to I.C. § 19-2827 which requires that all death sentences shall be reviewed by the Supreme Court of Idaho and that the Court shall specifically determine:

> (3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

We have reviewed the sentence imposed and compared it with the sentences imposed in other capital cases.[4] In

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[4] Those cases we have considered include: *State v. Bryan Lankford,* 113 Idaho 688, 747 P.2d 710 (1987); *State v. Johns,* 112 Idaho 873, 736 P.2d 1327 (1987); *State v. Stuart,* 110 Idaho 163, 715 P.2d 833 (1985); *State v. Windsor,* 110 Idaho 410, 716 P.2d 1182 (1985); *State v. Scroggins,* 110 Idaho 380, 716 P.2d 1152 (1985); *State v. Fetterly,* 109 Idaho 766, 710 P.2d 1202 (1985); *State v. Beam,* 109 Idaho 616, 710 P.2d 526 (1985); *State v. Aragon,* 107 Idaho 358, 690 P.2d 293 (1984); *State v. Bainbridge,* 108 Idaho 273, 698 P.2d 335 (1985); *State v. Paradis,* 106 Idaho 117, 676 P.2d 31 (1983); *State v. Gibson,* 106 Idaho 54, 675 P.2d 33 (1983); *State v. Sivak,* 105 Idaho 900, 674 P.2d 396 (1983); *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983); *State v. Major,* 105 Idaho 4,

(Continued on following page)

making the comparison we have considered: (1) the nature of, and the motive for, the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant to determine whether the sentence was

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665 P.2d 703 (1983); *State v. Mitchell,* 104 Idaho 493, 660 P.2d 1336 (1983), *cert. den.,* 461 U.S. 934, 103 S.Ct. 2101, 77 L.Ed.2d 308 (1983); *State v. Carter,* 103 Idaho 917, 655 P.2d 434 (1982); *State v. Olin,* 103 Idaho 391, 648 P.2d 203 (1982); *State v. Stormoen,* 103 Idaho 83, 645 P.2d 317 (1982); *State v. Osborn,* 102 Idaho 405, 631 P.2d 187 (1981); *State v. Griffiths,* 101 Idaho 163, 610 P.2d 522 (1980); *State v. Padilla,* 101 Idaho 713, 620 P.2d 286 (1980); *State v. Fuchs,* 100 Idaho 341, 597 P.2d 227 (1979); *State v. Needs,* 99 Idaho 883, 591 P.2d 130 (1979); *State v. Lindquist,* 99 Idaho 766, 589 P.2d 101 (1979); *State v. Bradley,* 98 Idaho 918, 575 P.2d 1306 (1978); *State v. Birrueta,* 98 Idaho 631, 570 P.2d 868 (1977); *State v. Allen,* 98 Idaho 782, 572 P.2d 885 (1977); *State v. Ward,* 98 Idaho 571, 569 P.2d 916 (1977); *State v. Gerdau,* 96 Idaho 516, 531 P.2d 1161 (1975); *State v. Powers,* 96 Idaho 833, 537 P.2d 1369 (1975) *cert. den.,* 423 U.S. 1089, 96 S.Ct. 881, 47 L.Ed.2d 99 (1976); *State v. Hokenson,* 96 Idaho 283, 527 P.2d 487 (1974); *State v. Hatton,* 95 Idaho 856, 522 P.2d 64 (1974); *State v. Standlee,* 96 Idaho 165, 525 P.2d 360 (1974); *State v. Foley,* 95 Idaho 222, 506 P.2d 119 (1973); *State v. Beason,* 95 Idaho 267, 506 P.2d 1340 (1973); *State v. Atwood,* 95 Idaho 124, 504 P.2d 397 (1972); *State v. Sanchez,* 94 Idaho 125, 483 P.2d 173 (1971); *State v. Gomez,* 94 Idaho 323, 487 P.2d 686 (1971); *State v. Dillon,* 93 Idaho 698, 471 P.2d 553 (1970), *cert. den.,* 401 U.S. 942, 91 S.Ct. 947, 28 L.Ed.2d 223 (1971); *State v. Radabaugh,* 93 Idaho 727, 471 P.2d 582 (1970); *State v. Rodriguez,* 93 Idaho 286, 460 P.2d 711 (1969); *State v. Jiminez,* 93 Idaho 140, 456 P.2d 784 (1969); *King v. State,* 93 Idaho 87, 456 P.2d 254 (1969); *State v. Gonzales,* 92 Idaho 152, 438 P.2d 897 (1968); *State v. Chaffin,* 92 Idaho 629, 448 P.2d 243 (1968); *Carey v. State,* 91 Idaho 706, 429 P.2d 836 (1967); *State v. Koho,* 91 Idaho 450, 423 P.2d 1004 (1967); *State v. Anstine,* 91 Idaho 169, 418 P.2d 210 (1966); *State v. Gish,* 87 Idaho 341, 393 P.2d 342 (1964); *State v. Clokey,* 83 Idaho 322, 364 P.2d 159 (1961); *State v. Burris,* 80 Idaho 395, 331 P.2d 265 (1958); *State v. Snowden,* 79 Idaho 266, 313 P.2d 706 (1957); *State v. Buchanan,* 73 Idaho 365, 252 P.2d 524 (1953); *State v. Owen,* 73 Idaho 394, 253 P.2d 203 (1953) (considered only in terms of crime committed and penalty imposed); overruled on substantive law point in *State v. Shepherd,* 94 Idaho 227, 486 P.2d 82 (1971); *State v. Pettit,* 104 Idaho 601, 661 P.2d 767 (Ct.App.1983); *State v. Fenley,* 103 Idaho 199, 646 P.2d 441 (Ct.App.1982).

proportionate and just. After thoroughly examining the record and evaluating these factors, we find nothing that would indicate that the sentence of death imposed against Lankford was disproportionate or unjust. The comments this Court made relative to Bryan Lankford's sentence at 113 Idaho at 704, 747 P.2d at 726 are equally applicable to this case.

The judgment of conviction and the sentence imposed are affirmed.

BAKES, C.J., concurs.

JOHNSON, J., concurs in Parts I-VII and VIII(B), concurs specially in Parts VIII(A) and IX.

SCHWARTZMAN, J. Pro Tem., concurs in Parts I and III through IX and concurs in the result in Part II.

SHEPARD, J., sat but did not participate due to his untimely death.

SCHWARTZMAN, Judge Pro Tem., concurring specially.

I write to concur specially in Part II of the court's opinion. Assuming that Instruction No. 24(a) was and is an incorrect or misleading statement of Idaho law, I find the giving of such instruction, when viewed in the light and context of all the other instructions, as well as the undisputed factual underpinnings giving rise to this case, is harmless error beyond any and all reasonable doubt. *See Delaware v. Van Arsdall,* 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986). Given the fact that the jury was properly instructed on the statutory definitions of Murder, Malice and Robbery, as well as the applicable burden of proof and elements of the crime, it is inconceivable that a

jury could be mislead [sic] into a "presumption" that malice is established as a matter of law from the mere fact that an unlawful killing took place during the perpetration of the crime of robbery. Moreover, this instruction can be analyzed as one where the predicate facts conclusively establish malice, so that no rational jury could find that the defendant committed the relevant criminal acts but did so without malice aforethought. It is also inconceivable, both as a matter of law and fact, that two innocent and helpless victims can be deliberately bludgeoned to death, one after the other, by another human being who somehow does not exhibit and possess the requisite criminal malice, either express or implied. The facts and reasonable inferences to be drawn therefrom are so overpowering and conclusive as to constitute harmless error beyond any shadow of a doubt. *See and compare Rose v. Clark,* 478 U.S. 570, 106 S.Ct. 3101, 92 L.Ed.2d 460 (1986). In my opinion, Instruction 24(a) is merely superfluous; at the very worst, it simply permits the jury to infer malice from defendant's conduct.

Finally, I write to concur specifically in Part IX of this Court's opinion. The sentence imposed is directly proportional to and commensurate with the sentence imposed and affirmed in *State v. Lankford,* 113 Idaho 688 at 703, 704, 747 P.2d 710 at 725, 726 (1987). The facts of this case depict a journey into the "heart of darkness," a descent into the soul of *evil.* The Judgment of Death is proportionate to the acts committed and is civilized society's just and ultimate condemnation of the perpetrator of this evil.

JOHNSON, Justice, concurring specially.

I concur with the lead opinion and write only to comment on Parts II (Instruction No. 24A), VIII(A)

(Constitutionality of Aggravating Circumstances) and IX (Proportionality).

INSTRUCTION NO. 24A.

The felony murder provision contained in I.C. § 18-4003(d) has come down to us virtually unchanged since territorial days. In 1882 the Supreme Court of the Territory of Idaho described the policy behind felony murder and noted the role that the commission of one of the enumerated felonies plays in the proof of first degree murder:

> It is competent for the legislature to prescribe what felonious homicides shall be deemed murder, and to define the degrees. It is the policy of the law to hold persons engaged in felonies, or attempts to commit felonies, responsible for all the consequences of their felonious acts, whether such consequences were definitely intended or not; *the intent to commit a felony standing in the place of the malice in ordinary cases of murder.*

People v. Mooney, 2 Idaho 17, 18, 2 P. 876 (1882) (emphasis added).

Under this reading of the statute, Instruction No. 24A correctly instructed the jury that proof of the perpetration or attempted perpetration of a robbery would stand in the place of malice in proving first degree murder.

Lankford attempts to persuade us that the instruction was incorrect, because in his brother's case this Court referred to the commission of the robbery as "a substitute for specific proof of premeditation." *State v. Lankford,* 113 Idaho 688, 695, 747 P.2d 710, 717 (1987); *vacated,* 486 U.S. 1051, 108 S.Ct. 2815, 100 L.Ed.2d 917 (1988); *affirmed,*

State v. Lankford, 116 Idaho 279, 775 P.2d 593 (1989). A careful reading of the opinion in that case indicates that what the Court was considering there was not a distinction between malice and premeditation. Instead, the Court was considering the argument of Lankford's brother that a felony murder instruction relieved the State of proving intent. The instruction may be found in a footnote to the opinion. 113 Idaho at 694 n. 5, 747 P.2d at 716 n. 5. The Court erroneously, I believe, held that the instruction did not state "that killing in perpetration of a robbery is malice *per se.*" *Id.* at 695, 747 P.2d at 717. The Court interpreted the instruction as advising the jury "that malice can be implied in some situations." *Id.*

In my view, proof of a first degree murder under I.C. § 18-4003(d) does not require proof of premeditation or express malice. Premeditation is an element of first degree murder under I.C. § 18-4003(a). ("All murder . . . which is perpetrated by any kind of wilful, deliberate and premeditated killing is murder of the first degree.") Malice is supplied by the perpetration or attempted perpetration of one of the enumerated felonies. This conclusion is supported by *State v. Paradis,* 106 Idaho 117, 125, 676 P.2d 31, 39 (1984) and *State v. Windsor,* 110 Idaho 410, 419, 716 P.2d 1182, 1191 (1985). In *Paradis* we said:

> Under the felony murder rule, a defendant who participates in a robbery can be held liable for the death of any person killed during the commission of that robbery, regardless of the individual defendant's intent that a death occur.

Lankford challenges Instruction 24A as violating the rule of *Sandstrom v. Montana,* 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Substantial doubt has been cast on the validity of felony murder convictions under *Sandstrom.*

E.g., Roth and Sundby, *The Felony-Murder Rule: A Doctrine at Constitutional Crossroads,* 70 Cornell L.Rev. 446, 460-471 (1985). However, as recently as June 21, 1989, the Supreme Court of Wyoming pointed out: "No jurisdiction has held that a felony murder statute violates the rule of *Sandstrom v. Montana,. . . .* " *Murray v. State,* 776 P.2d 206, 1989 WL 67582 (Wyo.1989).

CONSTITUTIONALITY OF AGGRAVATING CIRCUMSTANCES.

The lead opinion upholds the constitutionality of the aggravating factor that "the murder was especially heinous, atrocious or cruel, manifesting exceptional depravity," on the ground that judges, not juries, impose death sentences in Idaho. The constitutionality of this factor was upheld on other grounds in *State v. Charboneau,* 116 Idaho 129, 774 P.2d 299, 321 (1989). We said in *Charboneau* in addressing a different issue: "Although we have upheld sentencing by district judges in death penalty cases, we are not prepared to interpret the eighth amendment to give judges more latitude than juries in making their decisions as to whether a defendant should be executed." 116 Idaho at 150, 774 P.2d at 320.

PROPORTIONALITY OF THE DEATH SENTENCE.

While I concur with the conclusion that the sentence of death imposed against Lankford was not disproportionate or unjust compared to the sentences in other recent capital cases, I object to the rote citation of the cases we have supposedly considered. While some of the many cases cited are well known, others are inapposite and some are outdated. I particularly object to the citation of cases in

which the death penalty was not at issue. *E.g., State v. Stormoen,* 103 Idaho 83, 645 P.2d 317 (1982) (indeterminate life sentence based on a plea to second degree murder). Also, over half of the cases cited involve sentences that were handed down before our present death sentencing statute was enacted in 1977. For myself, I have personally reviewed the cases since 1977 that I believe are comparable to this one. I suggest that we discontinue the practice of routinely citing cases which are not in point and which are outdated.

Appendix "A"

HUNTLEY, Justice, concurring and dissenting [in *State v. Charboneau*].

While I support the death penalty and concur in the bulk of the majority opinion, I respectfully suggest that Idaho's present capital sentencing procedure is unconstitutional because it removes the jury from its constitutional fact-finding role. Our process violates the federal constitution for the reasons stated in *Adamson v. Ricketts,* 865 F.2d 1011 (9th Cir.1988) and violates the Idaho Constitution for the reasons I have articulated in *State v. Creech,* 105 Idaho 362, 670 P.2d 463 (1983) and *State v. Sivak,* 105 Idaho 900, 674 P.2d 396 (1983). I will discuss each analysis in turn.

I.

The Jury as Fundamental to Preserving Democracy

The determination of the issue presented on appeal should be made in the context of the history and purposes of the right to trial by jury. Our forefathers wisely

provided in Article 1, Section 7 of the Idaho Constitution: "The right to trial by jury shall remain inviolate . . . " They so provided because they recognized that the jury system is the single most important guardian of the people's right to be protected from oppressive and overreaching government.

Few Americans realize that the right to jury trial in civil cases has almost been lost in England. English judges, with the acquiescence of a compliant bar, have totally eliminated the right to trial by jury in civil cases, except in cases of libel or slander. The English themselves seem to have forgotten the words of their eminent jurist, Blackstone, who wrote that trial by jury is:

> . . . the glory of the English law . . . [i]t is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected in his property, his liberty, or his person but by the unanimous consent of twelve of his neighbors and equals.

Blackstone Commentaries 79.

Some American judges and legislators have similarly lost touch with the following language in our Declaration of Independence:

> [George III] has combined with others to subject us to a jurisdiction foreign to our Constitution, and unacknowledged by our laws; giving his assent to their acts of pretended legislation: . . . For depriving us, in many cases, of the benefits of trial by jury . . .

The French philosopher and essayist, de Tocqueville, who understood and appreciated democracy in America with

keener insight than any other observer of the Nineteenth Century, stated that the jury system in America:

> . . . places the real direction of society in the hands of the governed . . . and not in . . . the government . . . He who punishes the criminal . . . is the real master of society. All the sovereigns who have chosen to govern by their own authority and to direct society, instead of obeying its direction, have destroyed or enfeebled the institution of the jury.

Those who believe in strict construction of our Constitution recognize that the judiciary's oath to "support and defend the Constitution" requires that we resist the temptation to enhance judicial power through encroachment into the provinces constitutionally delegated to the jury.

II.

The Federal Right to Jury Fact Finding in Capital Cases

In *Adamson v. Ricketts,* the 9th Circuit stated the issue:

> Adamson also contends that the Arizona statutory scheme for imposing the death penalty erroneously lists elements of the offense as factors to be determined by the sentencing judge, thus depriving him of his right to a jury decision on the elements of the crime in violation of the Sixth and Fourteenth Amendments. We agree.

The Idaho sentencing procedure under I.C. § 19-2515 is virtually identical in all material respects to the defective Arizona statutory scheme. Noteworthy is the fact that Idaho and Arizona are two of only four states which have

the death penalty which have taken the jury out of the fact-finding process of making the ultimate determination as to whether the death penalty is appropriate. The fact that thirty-one of the thirty-five states which have the death penalty utilize the jury in making that determination speaks volumes as to what our Anglo-American traditions and constitutions require.

As the *Adamson* court noted:

> An aggravating "circumstance" which elevates a murder to a "death-eligible" murder in the penalty phase, remarkably mirrors the attributes of an essential element of the offense during the guilt phase of a trial. Like an element of a crime, an aggravating circumstance in the Arizona scheme informs the prosecutor what facts must be proven to obtain a conviction. The circumstance must be proven beyond a reasonable doubt. The hearing is adversarial, with oral argument and the prosecution's presentation of evidence governed by the usual rules of evidence. The presiding trial judge must make findings on the existence or nonexistence of each of the statutory aggravating and mitigating circumstances. If the judge finds an aggravating circumstance, the burden then shifts to the defendant who must put on sufficient evidence of mitigation or the death penalty will be imposed. A.R.S. § 13-703; *see also Arizona v. Rumsey,* 467 U.S. 203, 210[, 104 S.Ct. 2305, 2309, 81 L.Ed.2d 164] (1984). If the prosecution is unable to prove the existence of a single aggravating circumstance, like not proving an essential element, the defendant cannot be put to death. *Cf. Poland v. Arizona,* [476 U.S. 147,] 106 S.Ct. 1749, 1754[, 90 L.Ed.2d 123] (1986) (Court framed the relevant inquiry as "whether the sentencing judge or the

> reviewing court has "decid[ed] that the prosecution has not proved its case for the death penalty and hence has 'acquitted' petitioners"); *Rumsey*, 467 U.S. at 212[, 104 S.Ct. at 2310] (where findings of fact at sentencing hearing were all favorable to defendant, he was "acquitted" of the death penalty).

Although Idaho's majority in *Charboneau,* similarly to the judiciary in Arizona and the prosecutors in both states, urge that a trial court in finding facts as to aggravating circumstances is exercising a "sentencing determination" as distinguished from finding the elements of a death-eligible murder, their use of the language in justifying that position frequently results in Freudian slips which indicate otherwise. In fact, to rule for the state's position it is necessary to do exactly what the majority did in this case, that is, engage in a circular argument, the majority reasoning 116 Idaho at page 146, 774 P.2d at page 316.

> To accept Jaimi's argument that the jury must be involved in determining whether aggravating circumstances exist, we would have to conclude that the aggravating circumstances listed in I.C. § 19-2515(g) are elements of first degree murder. We are unable to reach that conclusion. *The circumstances listed in the statute are clearly circumstances to be considered in sentencing and not elements of first degree murder.* It is not unconstitutional for a judge, instead of a jury, to determine whether any of the aggravating circumstances listed in the statute exist.

The sentence I have underscored is totally circular. Of course, if one can pronounce that the circumstances are part of sentencing and not part of the elements of a death

penalty crime, then they are not elements of a death penalty crime.

The plain fact is, before a person is eligible to be executed, a *finding* must be made that the aggravating circumstance existed. That finding is typically a jury finding, it was a jury function in Idaho from territorial days through 1977, and is a fact to be found by the jury in all but four of the states which have the death penalty.

It could of course be argued that my position is circular if I were to take the underscored sentence from the majority opinion, *supra,* and restate it as follows:

> The circumstances listed in the statute are not circumstances to be considered in sentencing but are elements of death-eligible murder.

However, I would submit that the issue is best resolved by recognizing that it is traditional and accepted jurisprudence that every factor required to prove a crime is considered an element of that crime. One cannot be sentenced to death without the finding of the aggravating circumstances having taken place and, thus, they would appear to be essential elements of the crime rather than some less important procedural matters occurring during sentencing.

The United States Supreme Court has not passed directly upon the issue presented in this case, but what it has written about the jury and its function in death penalty cases indicates that the process would be best served by bringing the four states in line at this time.

Since the Court has held that death sentences must comport with the community's sense of evolving standards of decency and its legitimate desire for moral retribution,

an essential question is whether judges alone can reliably reflect the communal values that are the source of the constitutionality of capital punishment.

By definition, juries, not judges, are "the cross-section of the community," reflecting community values. *Duren v. Missouri,* 439 U.S. 357, 359, 99 S.Ct. 664, 666, 58 L.Ed.2d 579 (1979). Only a representative jury assures "meaningful community participation." *Ballew v. Georgia,* 435 U.S. 223, 235, 98 S.Ct. 1029, 1036, 55 L.Ed.2d 234 (1978) (plurality opinion). Jurors, unlike judges, are selected to enhance the likelihood that they represent the whole range of community beliefs and backgrounds, *Taylor v. Louisiana,* 419 U.S. 522, 531-33, 95 S.Ct. 692, 698-699, 42 L.Ed.2d 690 (1975); the different segments of the community bring to the representative jury "perspectives and values that influence both jury deliberation and result," *id.* at 532 n. 12, 95 S.Ct. at 698 n. 12. *See Humphrey v. Cady,* 405 U.S. 504, 509, 92 S.Ct. 1048, 1052, 31 L.Ed.2d 394 (1972). Moreover the sheer difference in size between a twelve-member jury panel and a single judge may bear significantly on the validity of a sentencing decision under the Eighth Amendment. Canvassing expert empirical studies, the United States Supreme Court has concluded that the likelihood that a decision in a criminal case correctly applies "the common sense of the community to the facts" increases with the number of decisionmakers. *Ballew v. Georgia, supra,* 435 U.S. at 232, 98 S.Ct. at 1035.[1] Twelve individuals are obviously more

[1] *Ballew* also amassed considerable empirical evidence to prove that reducing the number of decisionmakers in a criminal case impairs the accuracy, fairness, thoroughness and consistency of the decision, generally to the detriment of the defendant. *Ballew v. Georgia,* 435 U.S.

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likely to reflect the prevailing views of society than one person.[2]

A jury need not engage in questionable speculation to determine what community sentiment would say in a particular case. Its very function is to bespeak that community sentiment by exercising its own judgment. The jury's response is society's response. *Witherspoon v. Illinois, supra,* 391 U.S. 510 at 519-20, 88 S.Ct. 1770 at 1775-1776, 20 L.Ed.2d 776 (1968). "The jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved," *Gregg v. Georgia, supra,* 428 U.S. 153 at 181, 96 S.Ct. 2909 at 2928, 49 L.Ed.2d 859 (1976). By contrast, judges cannot themselves speak for community sentiment. If they are to fulfill the demands of the Eighth Amendment by bringing evolving standards of decency and principles of retribution to bear in a capital punishment case, they can do so only indirectly since "[C]ourts are not representative bodies. They are not designed to be a good reflex of a democratic society. Their judgment is best informed, and therefore most dependable, within narrow limits." *Dennis v. United States,* 341 U.S. 494, 525, 71 S.Ct. 857, 875, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring). Unable to represent community sentiment, a judge must undertake to ascertain it. That is necessarily a difficult task,[3] made even more difficult

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223, 232-39 [98 S.Ct. 1029, 1035-38, 55 L.Ed.2d 234] (1978) (plurality opinion).

[2] Significantly, every state authorizing jury involvement in capital sentencing appears to require a jury of twelve persons.

[3] Judges may theoretically have access to community sentiment through social contact, as well as through such sources as polls, editorials, journals, and newspaper reports. Cook, *Public Opinion and Federal Judicial Policy,* 21 Am.J.Pol.Sci. 567, 576 (1977). Unfortunately, these

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because judges – whether considered in terms of race, sex, or economic class – do not reflect the wide range of backgrounds or beliefs within the community.[4] "[T]he reluctance of juries in many cases to impose the sentence [of death] may well reflect the humane feeling that this most irrevocable sanction should be reserved for a small number of extreme cases," *Gregg v. Georgia, supra,* 428 U.S. at 182, 96 S.Ct. at 2929. For a variety of reasons, judges appear less likely to reflect that same reluctance.[5]

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sources greatly overstate the willingness of members of the community to impose the death penalty on specific defendants for specific crimes. Research on jury behavior reveals that jurors are substantially more lenient when trying an actual case and sitting through deliberations than they will otherwise indicate. Aeisel & Diamond, *The Effect of Peremptory Challenges on Jury and Verdict: An Experiment in a Federal District Court,* 30 Stan.L.Rev. 491, 511-12 (1978) (shadow juries drawn randomly and not subject to peremptory challenges vote guilty far more often than real juries; probably because the defendant's liberty was not in their hands). People who favor the death penalty in the abstract are more lenient when presented with descriptions of actual cases.

[4] As of 1979 judges in state courts of general trial jurisdiction earned salaries ranging from $24,000 in Oklahoma to $54,205 in California, with a mean of approximately $41,000. Nat'l Center for St. Cts., Survey of Judicial Salaries 1 (Sept.1979). As of 1977 in these general jurisdiction courts, only 2.5 percent of the 5,155 judges were women, and 20 states had no women at all on these courts. Cook, Women Judges: *The End of Tokenism, in Women in the Courts,* 84, 87-88 (Nat'l Center for St. Cts. 1978). It appears that as of 1977 only 2.6 percent of the judges on these general trial courts were black. G.W. Crockett, Number and Distribution of Black Judges (March 1977) (unpublished charts on file with Nat'l Center for St. Cts.). Finally, the rigorous educational requirements for admission to the bar make it inevitable that the average educational attainment of judges will far exceed that of the community in general.

[5] Kalven and Zeisel's classic report shows that judges and juries disagree in a substantial number of cases. In a study of 3576 trials, judge and jury reached the same decision about a criminal defendant

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only 72 percent of the time. *H. Kalven & H. Zeisel, The American Jury,* 68 (1966). In their specific study of the death penalty, the authors report that judge and jury disagreed about the imposition of a death sentence in 19 percent of the cases, *id,* at 436. To view the results yet another way, in those cases where one or both recommended death, judge and jury disagreed 60 percent of the time. In those cases in which either the judge or jury or both would have voted for the death penalty, in 40 percent, judge and jury agreed, and in 40 percent only the judge would have voted for the death penalty, yet in only 20 percent of the cases would the jury but not the judge vote for execution. Thus, the juries were essentially twice as lenient as the judges. *Ibid.* As a United Nations Report concludes:

> "[A]mong the leading authorities in penal science, the supporters of abolition appreciably outnumber those who favour the retention of capital punishment. The specialists of the social sciences, penologists, doctors and writers on social science or criminology are, in their great majority, abolitionists. The supporters of capital punishment, apart from a number of political figures and persons holding high public office, are generally jurists with a traditional training and judges."

United Nations, Dept. of Economic and Social Affairs, Capital Punishment (ST/SOA/SD/9-10-64) (1968).

The reason for these differences may lie in the greater reluctance of judges to depart from what they perceive to be the letter of the law. *See, e.g., Eddings v. Oklahoma,* 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Kalven and Zeisel discovered in more than one judge "a kind of envy of the freedom of the jury to reach a decision which he as a judge could not reach" *Kalven & Zeisel, supra,* at 428. The judge's role as a strict enforcer even restricts his discretion in sentencing decisions where that discretion would seem to be wholly lawful. As one judge said of draft evasion cases: "I am opposed to conscription. I also believe that the war in Vietnam is both immoral and impractical. My sentencing policies are based upon the fact that as long as law exists, it should be imposed to effectuate its intent and purpose." Cook, *Sentencing Behavior of Federal Judges*: Draft Cases-1972, 42 Cinn.L.Rev. 597, 623 (1973). At the same time, Cook's study also reveals that as judges (unlike individual jurors) accrue experience in a given type of case, their sentencing settles into distinct and regular patterns of severity or leniency, *id.*, at 602-03, so that the judge's first decision whether a person lives or dies may inspire far more deliberation and consideration

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As a means of reliably reflecting community sentiment on capital punishment, bringing lay jurors into the sentencing process "'places the real direction of society in the hands of the governed . . . and not in . . . the government.'" Powell, *Jury Trial of Crimes,* 23 Wash. & Lee L.Rev. 1, 5 (1966) quoting de Tocqueville, Democracy in America 282 (Reeve Tran.1948). Quintessentially, the right to a jury "is granted to criminal defendants in order to prevent oppression by the government," *Duncan v. Louisiana,* 391 U.S. 145, 155, 88 S.Ct. 1444, 1450, 20 L.Ed.2d 491 (1968), and to protect against "arbitrary action" by the compliant, biased, or eccentric judge. *Id.* at 156, 88 S.Ct. at 1451. It "reflects a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizens to one judge or to a group of judges." *Ibid.*[6] These concerns are even

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than subsequent decisions. For individual jurors, however, the gravity with which they approach their decisions in capital cases will rarely be affected by such routinization.

Florida studies report that sentencing judges were significantly more inclined to impose death than the juries that recommended sentences to them. The studies also show that the judges' decisions seem to correlate with the race, sex, and social background of the defendant and victim, while the juries showed no evidence of any such biases.

[6] The *Proffitt* plurality's speculation that "judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury and therefore is better able to impose sentences similar to those imposed in analogous cases," *Proffitt v. Florida,* 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, must, of course, be read in the context in which it was made: as a statement of the probable result of the Florida system in which an advisory jury sentence may be mitigated at the discretion of the trial judge, or increased from life imprisonment to death only where a life sentence would be manifestly unreasonable. *Id.* at 249-50, 96 S.Ct. at 2965-2966. Moreover, empirical evidence suggests that individual state trial judges

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more compelling where life stands immediately in the balance.

III.

The Idaho Constitutional Mandate

The Idaho Constitution, as first approved on July 3, 1890, and as it reads today, provides in Art. 1, § 7:

"Right to trial by jury. – The right of trial by jury shall remain inviolate. . . . " That right of trial by jury as it existed at the time our constitution was adopted, provided for jury participation in the capital sentencing process. Section 17 of the Criminal Practice Act of 1864 provided in pertinent part:

> [A]nd the jury before whom any person indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict, whether it be murder of the first or second degree; but, if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree, shall suffer death, and every person

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are not likely to achieve consistency among death sentences meted out across the state. Cook, *Public Opinion and Federal Judicial Policy,* 21 Am.J.Poli.Sci. 567, 623 (1977). Rather the state can better take advantage of the purported ability of judges to ensure consistency in capital sentencing, at no cost to the defendant's right to jury sentencing, by relying on the automatic appeal procedure by which this Court must review each death sentence in comparison to other cases involving similar crimes or defendants. I.C. § 19-2827. *See, Gregg v. Georgia,* 428 U.S., at 204-06, 96 S.Ct. at 2939-2940; *id,* at 211-12, 96 S.Ct. at 2942-2943 (White, J., concurring).

> guilty of murder in the second degree is punishable by imprisonment in the territorial prison for a term not less than ten years, and which may be extended to life.

Section 17 was carried over verbatim into Revised Statute § 6563 (1887) enacted two years before the adoption of the Constitution.

In other words, the jury, by determining whether the party was guilty of either first or second degree murder, determined whether or not the death penalty would be imposed.

In *Blue Note Inc. v. Hopper,* 85 Idaho 152, 157, 377 P.2d 373 (1962), we stated:

> The provisions of the constitution pertaining to the right to trial by jury are construed to apply as it existed at the date of the adoption of the constitution.

Accord. Anderson v. Whipple, 71 Idaho 112, 227 P.2d 351 (1951); *Christensen v. Hollingsworth,* 6 Idaho 87, 53 P. 211 (1898); *Comish v. Smith,* 97 Idaho 89, 540 P.2d 274 (1975).

Idaho continued to employ the jury in the capital sentencing process during all of the intervening years until the Supreme Court of the United States struck down the death penalty statutes of most states through its 1972 decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346.

At the time of *Furman,* I.C. § 18-4004 read:

> Punishment for murder. – Every person guilty of murder in the first degree shall suffer death or be punished by imprisonment in the state prison for life, and the jury may decide which

> punishment shall be inflicted. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

In its first post-*Furman* session (1973), the Idaho legislature deleted the jury function from I.C. § 18-4004 and made all convictions of first degree murder subject to the death penalty. This was done in an attempt to remove the "cruel and unusual punishment" aspects disapproved in *Furman*. I.C. § 18-4004 was amended by striking out the words as lined out below:

> 18-4004. PUNISHMENT FOR MURDER. – Every person guilty of murder in the first degree shall suffer death. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison not less than ten years and the imprisonment may extend to life.

The 1973 Amendment restored the law to its 1864 standing.

After the United States Supreme Court in a series of cases declared statutes of other states which were similar to Idaho's 1973 version unconstitutional, the Idaho legislature responded in 1977 with the present statutory scheme providing for inquiry into mitigating or aggravating circumstances as set forth in I.C. § 19-2515 et seq. That amendment changed the statute back to its pre-1973 language except that it omitted restoring the jury function and added the reference to I.C. § 19-2515:

> 18-4004. PUNISHMENT FOR MURDER. Subject to the provisions of 19-2515, Idaho Code, every person guilty of murder of the first degree shall be punished by death or by imprisonment

> for life. Every person guilty of murder of the second degree is punishable by imprisonment not less than ten (10) years and the imprisonment may extend to life.

Except for four states which entirely abolished capital punishment in the nineteenth century, every American jurisdiction has at least at some time employed jury sentencing in capital cases. *McGautha v. California,* 402 U.S. 183, 200 n. 11, 91 S.Ct. 1454, 1463 n. 11, 28 L.Ed.2d 711 (1971). During a period of over a century, beginning in 1838, jurisdiction after jurisdiction that retained the death penalty replaced its mandatory capital punishment law with discretionary jury sentencing, *Woodson v. North Carolina,* 428 U.S. 280, 291-92, 96 S.Ct. 2978, 2985, 49 L.Ed.2d 944 (1976) (plurality opinion). By the time of the *Furman* decision in 1972, Colorado was the only state in the nation to impose capital punishment without jury involvement in the sentencing process.

Despite the long history at common law and under statutory law of the states throughout this nation of involving jury in the capital sentencing process, the Idaho legislature in the present statute enacted in 1977 totally excluded the jury from its traditional function. The legislative history shows that the legislature was not even presented with a bill which provided for jury participation. The only bill presented, was one drafted by the attorney general, Senate Bill 1082, which was presented to the legislature with the following statement of purpose:

RS 1954
S 1082
STATEMENT OF PURPOSE

> Only a few years ago, the United States Supreme Court made new "rules" concerning the

> imposition of the death penalty for serious crimes. So that we conformed with this U.S. Supreme Court interpretation of the federal Constitution, the Idaho Legislature enacted in 1973 our present death penalty Section 18-4003 and 18-4004, Idaho Code.
>
> Then, last year, the United States Supreme Court again changed the rules relating to capital punishment – after many states, like Idaho, had acted in response to its previous decision. The Court, in five cases, set forth new, more definitive rules concerning sentencing where the death penalty was sought to be imposed.
>
> *The purpose of this bill is to codify into Idaho law these present requirements imposed on the states by these most recent United States Supreme Court decisions* on capital punishment so that we will conform with this latest expression of the law. (Emphasis supplied.)

The statement of purpose is misleading insofar as it suggests that the Supreme Court decisions mandated the removal of the jury from its traditional powers and functions; the United States Supreme Court never at an earlier time or in this "latest expression of the law" required jury non-involvement.

Since jury participation in the capital sentencing process is part of the right to "trial by jury" as guaranteed inviolate by Art. 1, § 7 of the Idaho Constitution, I would reverse and remand for proper sentencing and would urge the legislature to amend the statutes to provide for proper jury participation in order that future capital punishment cases will not be subject to this serious defect.

IN THE SUPREME COURT
OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff, VS MARK HENRY LANKFORD, Defendant.	SUPREME COURT DOCKET NO. 15759 DISTRICT COURT CASE NO. 20158 VOLUME VIII OF VIII

BEFORE: The Honorable George R. Reinhardt, III, District Judge

Appealed from the District Court of the Second Judicial District of the State of Idaho, In and For the County of Idaho.

TRANSCRIPT OF THE 9TH AND 10TH DAYS' PROCEEDINGS OF A TEN DAY JURY TRIAL HAD ON THE 3D AND 4TH DAYS OF MAY, 1984

[1579] THE COURT: Mr. FitzMaurice.

MR. FITZMAURICE: Ladies and gentlemen of the jury, I would also like to thank you. I know that it's been a tough two weeks on probably everybody here. It's been a tough case.

A tragedy occurred in this county, in this rural county back in June, 1983. Two young people's lives were snuffed out, taken away. They are no longer with us. The family sits there. They no longer have any enjoyment in their lives. This small community that we live in, beautiful community, this county, this state, the tragedy occurred here. We who love our innocence in this state, the fact that we live in this state, our enjoyment of this area, our

freedom, a tragedy occurred with reference to those. The unfortunate thing is there is nothing I can do; there's nothing you can do to bring these people back to life, to restore their families, to restore our innocence as members of the state, members of this county.

I think the question that is before us today is whether or not another tragedy will occur. Whether or not the system will work. Whether or not we as citizens of this state, citizens of this country will succumb to the temptation to accept the first available to purge this [1580] tragedy from us, to seek vengeance for this tragedy. Whether we will also succumb to that panacea of accepting easy answers to tough questions. To purge ourselves, to give vengeance for this horrible thing that happened. That's the question we're here today for.

Initially I think it's important to you because it has been such a difficult time to apologize personally and on behalf of my client for the outburst in court. They were improper. They were reprehensible. If they caused any fear to you or uncomfortness, I apologize for him and I apologize as I am his counsel.

Mr. Lankford is not the only person on trial here today. In effect, our system is on trial. We're dealing with a very serious crime. The circumstances are abhorrent to us. The question is whether we will follow those fundamental precepts of our American justice system or whether we will submit to our baser emotions of revenge and fear. I would hope that we would follow those guiding principles of innocence until guilt is proven. That it must be proven beyond a reasonable doubt. That we will look hard at those principles, and let them be our guiding light.

I agree with Mr. Albers. There's not a lot of evidence that's in dispute here. We can cut out whole sections of this trial and turn our attention to one day in [1581] question, June 21st, 1983. I don't argue with Mr. Albers, and I think the evidence shows you that Mark Henry Lankford after June 21st, 1983, was in the Bravences' van. I think that you can most likely find that he participated in the fruits of this horrendous crime by use of those credit cards. That he ate dinner with his brother. That they bought these things with the Bravences' credit cards. I think you can find that Mr. Lankford had that camera in his possession in Texas. That he sold it to his brother. That he got the money from that. I think you can find that he knew his brother had that knife. He knew his brother had other things that they jointly shared in the van. It's not questioned. I don't question it. I don't think you question it. The evidence is uncontroverted.

I think we can also agree that that is reprehensible. But does it constitute murder in the first degree?

I think everyone of you promised me back in Boise that you would look at those other crimes and only take them for what they showed with relationship to this offense. What do they show? They show at some point in time that Mark Henry Lankford was with his brother, and that they enjoyed the fruits of this horrendous crime. They do not show that he participated in the murder or robbery of those individuals. It doesn't show that.

[1582] I would ask you to focus your attention on the 21st. There's no argument that these two gentlemen were up in the woods. That they were camping out. That many days prior to the 21st they covered this vehicle with sticks and leaves and branches. The testimony is uncontroverted

there. As to their intention in doing that, we have two different intentions expressed. One about the potential incarceration of Bryan Stuart Lankford on the Texas charges, and also the fact that the car may have been not paid for to GMAC and subject to repossession. I don't know how that exactly ties into the offense, but we know that is a given.

What I would ask you to do is focus in on the 21st. That's when the crime, if any, on the part of my client was committed.

I think you and I – although Mr. Albers isn't sure – know that the main testimony in this case was the testimony of Bryan Stuart Lankford. Mr. Albers doesn't know whether to take his star witness in whole or in part or pick or chose or tell you to do it independently of him or what. He takes what parts he wants of Mr. Lankford's testimony – Bryan Lankford's testimony and uses those. He doesn't use other part. I think you have two alternatives. To be blunt and honest to you, you can believe Mark's – Bryan Stuart Lankford's story. I think that's the least [1583] likely alternative for you, but you can believe it.

What do we know if we believe Bryan Stuart Lankford's testimony? His testimony would show that him and his brother went down. They went to McAlister. That he went into the campground, struck up this conversation with these two individuals. One left. His brother came running in. His brother struck Mr. Bravence on the back of the neck (indicating), and Mr. Bravence went down, or he was already on the ground, I think, is one of the statements. His face down on the ground, struck him across the back of the neck (indicating).

That the young lady, Cheryl Bravence, came up, was forced to lie down on the ground, was struck in the back of the neck. And that at that point in time the bodies and the equipment were loaded into the van, driven to a location near where the original campsite was. That Mark Stuart – Mark Henry Lankford then carried those bodies by himself into the brush, covered those bodies up and then came back to the van; and they left.

For the sake of argument, let's believe that's the facts. But let's put in one more important fact that's uncontroverted also. The injuries that were described by Dr. Cihak to the male subject, who was ultimately determined to be Mr. Bravence, he said that there had to be at least three areas of force that are on three separate [1584] locations. One, posterior cranial vault, up here on top of our heads (indicating). Two, left cranial vault over on our temple area (indicating). Three, the facial area near the eyes, nose, that area (indicating).

We know from his testimony that with reference to Cheryl Bravence there was at least two areas of force. That there was a facial area again; and, again, that there was the left cranial vault, the area near your temple. We also know that Cheryl Bravence suffered a fracture of her little. We also know that another area of force would have been the fracture of the clavicle of Mr. Bravence.

If we accept the testimony of Bryan Stuart Lankford, there was one blow, possibly two – but he again went back to one – struck [sic] on Mr. Bravence at that area, to the neck. There was one blow struck to Mrs. Bravence at that area to the neck. That he stated unequivocally that those individuals were alive at the time they were taken to the

campsite and ultimately taken out by Bryan – by Mark Lankford if we believe his story to be true.

So those people were alive at that campsite because they didn't have these dehabilitating injuries. They couldn't have. The blow was struck across the back of the neck, and they were alive when they were being transported because they had no damages done to them at that point in time (indicating) if we believe Bryan. And [1585] they were alive when they arrived at the campsite. And what, I think, Mr. Albers wants you to assume and what Bryan thinks the story is is that his brother then took those bodies out there, those human beings still alive, and that he executed them at that point in time.

Mr. Albers has read to you from Instruction 34. Unfortunately, he left out the last part which is probably the most important part. If you believe Bryan Stuart Lankford and his story, there's no way you can convict Mark Lankford of murder in the first degree. The robbery had been completed. They were, if this testimony is true, executed when they were in the back area of the woods.

The instruction says: However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant cannot be convicted of first degree murder.

You will also note that there are other instructions in there that says if you have any doubt with reference to two degrees of a crime that you are to get the lowest degree, that being second degree murder. So, let's say you accept Bryan's testimony which I think is unlikely. The only verdict you can then return would be second degree murder.

Let's take the other alternative which I think is [1586] the more likely alternative from seeing the testimony of Mr. Bryan Stuart Lankford. That Bryan Stuart Lankford is a liar. That he lied to you. That he's lied to other individuals. I think that's what we believe.

What type of an individual are we talking about? Well, we're talking about a person with a background in this area. Convicted of robbery in Texas, on parole, violating that parole –

MR. ALBERS: I'm going to object, your Honor. That's not the testimony.

MR. FITZMAURICE: I believe it is, your Honor.

MR. ALBERS: Probation.

THE COURT: The jury is instructed that arguments that the attorneys may make during the course of this trial are not evidence, and you are to rely on your memory as to what the evidence was.

You may proceed, Mr. FitzMaurice.

MR. FITZMAURICE: The difference between probation and parole. . . . I'll leave that to you. We know one thing, he was headed to the pen, and he knew he was headed to the pen. He has a fear of going to jail. That his underlying charges that lead him to that was evading arrest and DWI, and he had absconded that probation from Texas. That he has a background as a robber.

What else do we know about this individual? We [1587] know he's a man previously convicted of two counts of first degree murder. This is the man that Mr. Albers prosecuted (indicating) just a short time ago, now his star

witness. He doesn't know whether to tag his testimony on as part of the case or not because he's been so taken apart on the stand.

You should read the Instruction No. 15 that tells you with reference to how to judge a person of this character. How to judge an accomplice in a crime. You're supposed to judge it with caution and due care.

What type of individual is he – was he on the stand? Well, from his statement, he'd like to tell you that he was a sorrowful individual. That he was a religious individual. That he was timid. That he was nervous. That he was a follower. That he broke down and cried when he was confronted with Mr. Ploeger. That Jesus was his best friend. You saw him on that stand. Would you described [sic] his demeanor as that, or would you describe it as flippant, sarcastic, cold, uncaring. Here he recounted how he allegedly participated in the murder of two individuals. . . . I didn't see any tears. I didn't see any remorse. I saw a cold calculating mind.

What type of motive do we have for Bryan Lankford? Well, first of all, we have the testimony of Bryan Stuart Lankford. His motive is to tell the truth, to [1588] tell you the full story so the families can better understand this case and know what happened to their loved ones. That's what he tells you his motive is . . . to get the true story out.

What do we really know about him? That he took that agreement that him and Mr. Albers and Mr. Longeteig entered into as part of the deal for his testimony that no future charges would be taken against him. Further, we know that he in his own mind understands that his life is on the line. That he is facing the death penalty, and that it

is his understanding that by his testimony he would get an indeterminate life sentence, and his understanding of an indeterminate life sentence is that he could be released as soon as he's sentenced a short time thereafter. His motive is the most basic motive we all have . . . to live, to save his neck. He ran from Texas to avoid prison. He would lie to avoid prison. He would lie to avoid death.

Most important when we talked down at Boise I asked you: Do you think you can see a story that just doesn't fit? Do you think you look at it and say: This is a factual impossibility. This just didn't work out. His story doesn't hold together. Those puzzle parts just don't fit in our everyday.

Let's look at his story. Mr. Albers wants to tell you it's only been impeached in minor parts. Well, as [1589] to the statements, it's been impeached in fairly major parts. Also without those statements his story just doesn't hold water.

Let's look at what we do know. Bryan wants to leave the camp. Bryan is cold. He wants to go back to Texas. He wants to call his friend Roy to have him send up some money for bus fair or bus tickets. He wants to go to Golden, Idaho. And I would ask you to look on the map that this route you pass right through golden, Idaho, and how it's depicted on the map. He packs his bags. He, who wants to you that he's following the directions of his brother all the time, talks his brother into going even though his brother doesn't want to go. Mark wants to stay. Absurd as it might sound, he had some type of vision of being some type of mountain man, according to his brother; and he wanted to stay up there and live in the woods. Mark packs nothing. Mark is sick but wants to

stay. Mark leaves his car, numerous items of his personal property, including keepsake items. The rifle that was handed down to him from his father. Bryan Lankford, the past robber, takes his shotgun. Why? Because he wants to protect himself from marauding bears. But he doesn't even know if it's loaded.

They get into a vehicle. They get into Mr. Cox's vehicle, and I don't think that there's – that anybody is [1590] going to dispute that Mr. Cox picked them up. If Mark Lankford wanted a car and didn't want to walk, he was holding that shotgun right there while Mr. Cox was driving. And you may say you never try to steal something from someone who is moving along, driving because there could be an accident. However, Mr. Cox testified that when he got down to the Southfork Highway, he pulled out a map – stop, pulled out a map and showed them where they were going. The opportunity was there if that was Mark Lankford's intentions. If it was Mark Lankford's intentions to get credit cards or a car, he already had those items. it was his brother that wanted to leave.

Bryan comes up with . . . and states quite frankly . . . Mark wanted to go back. Mark wanted to stay in the mountains. They were going to go down and make some telephone calls, and that Mark's intention was to go back. Bryan says that they picked McAlister because Mr. Cox told them that they weren't going any further. That he had passed his turn off. That he had then turned around and gone back the same way they had already come. Mr. Cox tells you that that is not the case.

Then they exit the car. They get down, and they start to talk, and they ended up down near the river. Mark and Bryan discussed things.

Bryan wants you to believe that naive Bryan – a [1591] person convicted of robbery in Texas – thought that his brother said when there was a better way to get out of here that he thought that they were talking about riding a moose out.

Let's look at the story about how Bryan found this van. Three miles distance back up the road towards Golden is where this was located. It's a considerable period – place to walk. He tells you he went down river and then went back, down river then went back. That he went past where this van was located, saw nobody. Where was Mr. Lonnevik? He's only an eighth of a mile away. If it was the intentions of them at that time to rob somebody, what about Mr. Lonnevik? The sole . . . tiny man sleeping by the side of his car?

The time sequence . . . this van would have passed them if they were walking back and forth on the road. Mr. Lonnevik would have passed them if they were walking back and forth on the road. Because Mr. Lonnevik was already up there around darkness. We already know that these individuals were down there at least around seven o'clock according to the testimony. How come they didn't see these individuals?

They, according to Bryan Lankford, decided to steal the van. Can you believe his story as to how they prepared to steal that van? That the only discussion was:

[1592] That you walk in Bryan, strike up a conversation; and, then, he doesn't know what his brother is going to do. he doesn't know where his brother is. He doesn't know what happens if something goes wrong. Unbelievable story.

Then comes his multiple stories. Mark and I walked in and struck up the conversation is what he told Mr. Ploeger. Tells you here that Mark was in the bushes. He tells you that he never pointed that shotgun at the Bravences. That he remained in his position with the gun pointing down by the ground. And, then, he tells you it was almost dark; and he tells you that here we are in darkness. He's only a short distance away from Mr. Bravence. That his brother runs in from the side. Not waiving this stick that's never been found or never put in evidence. Not waiving the stick, but the stick my his side, and that his brother told the man to get on the ground and nobody would get hurt. And that the man got on the ground. How would the man in this near dusk area have seen a small twelve inch club of dark nature? Wouldn't his focus have been on the person with the shotgun if that was a true story? Wouldn't it have also been a true story, if this was the case, that the gun would have been pointed at Mr. Bravence? And that Mr. Bravence, a Marine, would get down on his belly for someone who just came screaming in without a noticeable weapon.

[1593] He tells you that Mr. Bravence said: Take the van and the money. Don't hurt us. He contradicts himself in previous statements and said nothing was said. One of the questions that Mr. Albers brought out – I'm glad he did – did you say anything prior to that time? Did you tell Mr. Bravence that you were interested in the van or the money? The answer was: No. Another absurdity that this individual would know out in the middle of the boonies that someone that came in and threatened them wanted the van and the money.

Next comes the story that he tells you that Mr. Bravence got down on the ground, but in the other story he tells Mr. Ploeger he was knocked to the ground. In one story he says that the woman came up at that point in time and says nothing, and in another story he says that she expressed concern about her husband.

The story as to the number of hits to the head does not even fit in with the evidence. His story that he was crying, that he was an emotional wreck as he loaded these people's personal possessions into the van. Does a person so broken down do that?

They left a clean camp. Nothing on that ground according to Mr. Lonnevik even though he previously stated that the camp had been set up fine. Except for the dog which was tied behind a bush.

[1594] His story is unbelievable. In answer to my questions, he said that they loaded the man first; and that they loaded him head toward the front of the van. Well, you saw the diagram that Mr. Difonzo did as to where the blood stain was located which matched the blood of Mr. Bravence. It was located on the outside portion of the van with the head – with the blood toward the rear where the blood would have come from if there was a hit from the head. Not anywhere near what Bryan Stuart Lankford told you. That the woman was then loaded next. And that this quivering person at this point in time was . . . able to drive a treacherous road that we know was mountainous, curvy, not a very good road. You wouldn't want to take up anything other than a four wheel drive type car. He was able to do this. He would have us believe that.

We then get to the place where the bodies were ultimately placed. You saw the pictures. You saw the diagrams. You heard the testimony of Bryan Lankford. That he backed the van into that area with the headlights pointing away, and that he stayed in the van. He told you the truth under oath that he stayed in the van, and that his brother carried these people like babies under his arms (indicating). A person one hundred and fifty-five pounds to a hundred and sixty pounds, six foot to five nine and a half in size, a limp body, that Mark Lankford picked these [1595] individuals up, carried them across all these obstacles in the pitch darkness. At that point in time, he must have placed objects on top of them and, then, came back and did the same thing. He also told you that the woman was picked up first. She was on the outside. At the grave site, Mrs. Bravence was on top, not on the bottom. Mr. Bravence was on the bottom.

We all succumb to the situation where we accept easy stories. The only person that didn't accept this easy story is seated right there. Mr. Randy Baldwin (indicating). He said this story didn't fit. He said in his interview with Bryan Lankford that would have been near impossible for one person to have carried this body – or these bodies to this location. He's the only person that has at this point in time of testimony – other than FBI Agent Ploeger – come up with any idea that this may not be the true story. That it doesn't fit.

Bryan tells you that he didn't see anything in Mark's hand. Where did this blue poncho come from? Deputy Baldwin told us that it appeared to be tied on in an unnatural manner and be placed in a certain area so as to

cover these bodies. Well, there's no testimony from Bryan that anything other than the bodies were taken up there. A totally unbelievable story.

The other aspects thereafter are fairly minimal. [1596] We have the knife that Bryan Stuart Lankford – and I'd ask you to look at it very carefully – put his initials on. I wonder where he got that information? He came out with it out of the blue. Not even responsive to a question at all about it.

We have the camera that Bryan wants to disassociate himself with, but his brother Robert said that Mark had it based upon a trade. Unfortunately and the saddest part of this . . . is we have Bryan having the credit cards, having the camera, having the knife, having all the pieces in this puzzle; and he wants to tell you that he doesn't know anything about these poor deceased people's jewelry, wedding rings. He wants to tell you that. Is that believable? Is that able to be fit in with his story?

This shotgun, also, a shotgun, the butt of the shotgun . . . Bryan's shotgun which could have caused these same injuries. Where is that shotgun? Left in the van. Other valuable items in the van are still there. He wants to tell you that the shotgun was left there.

Ladies and gentlemen, it comes down to the fact that: Do you believe Bryan Lankford's story? It's not a case of minor inconsistencies. The whole case is improbable. The whole story is improbable. We know he's a liar. We know because he told us so. His reason wasn't [1597] true. We know he's a liar. Mr. Ploeger . . . he's apprehended. The first story he gives is this story of going to Canada, and that the car was stolen. That he hitchhiked to Los Angeles

and then ended up in San Antonio and then ended up at the Trinity River. And he says he told that story because his brother told him to make no statements. That's illogical. And then when he is confronted with facts that show that his story doesn't fit, your fingerprints were found on items in the van. He goes: Uh-oh, I've got to change my story.

Again, he tells you that he changed his story to be in conformance with his brother's directions that he not say anything. Well, his next story blames his brother. The next story is that he stayed at camp. His brother stole the van. His brother killed the people. And that he merely went along for the ride thereafter.

I submit that maybe the opposite is true. That Bryan did it, and that his brother merely went along for the ride thereafter.

Only when he's confronted with the facts that he used the credit cards and his fingerprints were found on it, that he again changes his story.

And here comes the fatal flaw in the investigation and the prosecution of this case. He tells the story finally that implicates them both, and the law [1598] enforcement officials latch on to that. It's a story that meets their desires. Only Deputy Baldwin has questioned that story. They've lived with that story from day one; and, once it was accepted, Bryan Stuart Lankford knew it was accepted; and that he had to go with that story. And he's had inconsistencies from there on in.

Where does that leave us? It leaves us in a void. We know at this point in time if we don't accept his testimony that Mark Henry Lankford most likely was involved as an

accessory to the murder, and I would submit that's probably true. That he was brought in at some point in time after the murder was committed, and that he enjoyed the fruits of that, and that's reprehensible. It's not conduct we can accept.

We do know that without the testimony of Bryan Lankford there's no showing. We discard that, and there's nothing you can base your verdict on for first or second degree murder or even manslaughter.

Ladies and gentlemen, the burden – after Mr. Albers has a chance to rebut – now shifts to you; and it's a difficult burden. I would not want to be in your shoes. When we talked down at Boise, we all knew that we had to – that you'd have to dig real deep down inside. You had the same reasonable doubt instruction that we went on before. You're going to have to really reach down; you're going to [1599] have to reach to your souls, to your heart, to your inner being. I put my faith in you. Mark Lankford puts his faith in you. I'm sure you'll make the right decision.

* * *

IN THE DISTRICT COURT OF THE
SECOND JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF IDAHO

STATE OF IDAHO, Plaintiff, vs. MARK HENRY LANKFORD, Defendant.	)	Case No. 20158

JURY INSTRUCTIONS GIVEN BY THE COURT

May 4, 1984
(Date)

(Filed May 4, 1984)

/s/ George Reinhardt
District Judge ~~Magistrate~~

INSTRUCTION NO. 1

You will notice that some of these instructions are identical to those read at the start of this trial. This is not for special emphasis, but is done so that all the instructions concerning this case will be fresh in your minds when you start your deliberations.

These instructions contain all of the law that applies to this case, and it is your duty to follow these instructions, regardless of your own opinion of what the law is or should be, and regardless of what counsel upon either side

has stated the law to be. You must consider these instructions as a whole, and neither emphasize nor disregard any of them.

INSTRUCTION NO. 2

The Information on file in this case is only a formal method of accusing the defendant of a crime. An information is not evidence of any kind against the defendant. The fact that the defendant has been charged with two crimes and brought before this Court for trial is not evidence of guilt and raises no inference of guilt.

INSTRUCTION NO. 3

During your deliberations, you are to decide the issues of fact presented by the Information, and the defendant's pleas of not guilty, by examining all of the evidence admitted in open court, and you are to apply to the facts the law contained in these instructions. In this way you decide the case. You are the sole judges of what facts have been or have not been proven.

INSTRUCTION NO. 4

With reference to each particular offense charged by the Information, the State must prove each of the material elements of the offense to be true beyond a reasonable doubt before the defendant can be found guilty of that offense. The defendant in a criminal action is presumed to be innocent until the contrary is proved, and in this case if you have a reasonable doubt as to whether the defendant is guilty, he is entitled to an acquittal.

INSTRUCTION NO. 5

A reasonable doubt means what the words imply in the ordinary sense. A reasonable doubt exists when you do not have an abiding conviction that the offense charged has been proven, or your reasonable judgment is not convinced to a moral certainty of the truth of the charge.

"Reasonable doubt" does not mean a vague or shadowy or possible doubt or uncertainty, but a doubt that has common sense and reason for its basis and arises from all of the evidence. It is a doubt that would cause a reasonably prudent man to hesitate and pause in the important transactions of life. If, after fairly considering all of the evidence, you have a reasonable doubt whether guilt has been satisfactorily shown, you should give the defendant the benefit of such a doubt and find him not guilty.

INSTRUCTION NO. 6

In your deliberations, you must not be influenced by pity, sympathy, passion, prejudice, rumor or by any previous information you may have heard. However, you are not required to put aside your general observations and experience in the affairs of life, but may consider the evidence in the light of such observation and experience. The evidence referred to consists of: testimony of the witnesses and the exhibits.

INSTRUCTION NO. 7

If the evidence in this case is susceptible of two constructions or interpretations, each of which is reasonable, the one interpretation points to the guilt of the defendant, and the other to his innocence, it is your duty,

under the law, to adopt that interpretation which will point to the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule applies only when both of the two possible opposing conclusions are reasonable. If, on the other hand, one of the possible conclusions should be reasonable and the other be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable.

INSTRUCTION NO. 8

There are two types of evidence from which you may properly find a defendant guilty of a crime: one is direct evidence, such as the testimony of an eye witness. The other is circumstantial evidence, the proof of a chain of circumstances pointing to the commission of the offense.

As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that, before convicting a defendant, the jury must be satisfied from all the evidence in the case, that each material element of the offense charged is true beyond a reasonable doubt.

INSTRUCTION NO. 9

Statements, remarks and arguments of attorneys are not evidence but are for the purpose of assisting the Court or jury in their duties. Any statement, remark or argument, which does not conform to the evidence as you remember it or to these instructions should be disregarded.

The production of evidence in court is governed by certain legal principles and during the trial I have ruled on the admissibility of certain evidence. You are not to be concerned with the reasons for my rulings as these were matters for my determination. You must disregard entirely, and not consider, any evidence to which an objection was sustained or which was ordered stricken.

If any evidence has been admitted for a particular purpose, it must not be considered by you for any other purpose whatsoever.

INSTRUCTION NO. 10

You are the sole judges of the credibility, that is, the worthiness of belief, of any witness and the weight to be given any evidence. In determining credibility and weight, you should consider the witness's memory, ability and opportunity to observe, his manner while testifying, any motive, interest, bias or prejudice such witness may have, the character of his testimony, and its reasonableness in the light of all the evidence in the case, taking into account your experience among people. You may also consider whether the witness has been contradicted by other evidence which is credible, or has been impeached in any way. To "impeach" means to produce proof that the witness is not worthy of belief. A witness may be impeached by proof that he has been previously convicted of a felony.

Impeachment of a witness does not necessarily mean that his testimony is completely deprived of value, or that its value is destroyed in any degree. The effect of impeachment upon the credibility of the witness is for you to determine.

INSTRUCTION NO. 11

Neither by any ruling or remark I made during the trial or by anything in the instructions have I meant to indicate any opinion on my part as to the facts of this case or the credibility of any witness and no such opinion by me should be inferred by you. These are matters for your sole determination.

INSTRUCTION NO. 12

In reaching your verdict in this action, you are to be guided and controlled only by the evidence admitted at this trial and the instructions given you by the Court. If any of you have received information, or what purports to be information, from any other source than the evidence adduced at this trial concerning this case, you are instructed to exclude such extraneous information from all consideration. Your verdict should be based exclusively upon the evidence offered at this trial, and should in no way be influenced by any rumor, information, feeling, or influence coming from any other quarter either before or during this trial.

INSTRUCTION NO. 13

As I explained to you earlier, the defendant, Mark Henry Lankford, is on trial here because the State has charged that he committed two counts of first degree murder. The only questions you must answer is whether the State proved, beyond a reasonable doubt, that he committed this crime. It is not up to you to decide whether any other person is guilty of any crime. The question of the possible guilt of others should not enter your thinking

when you decide whether the State has proved beyond a reasonable doubt that the defendant committed the crime.

INSTRUCTION NO. 14

The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn from the fact that the defendant has not testified.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

INSTRUCTION NO. 15

An accomplice is one who unites with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.

You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

INSTRUCTION NO. 16

You are instructed that the fact that a co-defendant has been found guilty of the offense charged is not evidence, in and of itself, of the guilt of any other person.

INSTRUCTION NO. 17

You are instructed that the flight of a person immediately after the commission of a crime, or after he is accused of a crime, is not sufficient in itself to establish his guilt, but is a fact which, if proved, may be considered by you in the light of all other proved facts in deciding the question of his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine.

INSTRUCTION NO. 18

You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

INSTRUCTION NO. 19

To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.

However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.

If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.

If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

INSTRUCTION NO. 20

If the crime of murder in the first degree was committed by anyone, the witness Bryan Stuart Lankford was an accomplice as a matter of law and his testimony is subject to the rule requiring corroboration.

INSTRUCTION NO. 21

Ladies and gentlemen of the jury, you are instructed that the state of Idaho has filed a criminal Information against the defendant, Mark Henry Lankford, charging him, with two counts of first degree murder, alleging that said crimes were committed as follows:

COUNT I

That, the said defendant, Mark Henry Lankford, on or about the 21st day of June, 1983, at or near Santiam Creek near the South Fork of the Clearwater River in Idaho County, State of Idaho, unlawfully and with malice aforethought did kill Robert Bravence, by beating said person with an unknown object from which said Robert Bravence died in Idaho County, State of Idaho, on or about the 21st day of June, 1983; furthermore, that said beating was committed in the perpetration of a robbery by which said defendant, Mark Henry Lankford, did by means of force or fear wrongfully and feloniously take personal property in the possession of Robert Bravence, from the person or immediate presence and against the will of said Robert Bravence, all of which acts constitute a violation of Idaho Code Sections 18-4001, 18-4003(d).

To which charge, the defendant, Mark Henry Lankford, has entered his plea of not guilty.

COUNT II

That, the said defendant, Mark Henry Lankford, on or about the 21st day of June, 1983, at or near Santiam Creek near the South Fork Area of the Clearwater River in Idaho County, State of Idaho, unlawfully and with malice aforethought did kill Cheryl Bravence, by beating said person with an unknown object from which said Cheryl Bravence died in Idaho County, State of Idaho, on or about the 21st day of June, 1983; furthermore, that said beating was committed in the perpetration of a robbery by which said defendant, Mark Henry Lankford, did by means of force or fear wrongfully and feloniously take personal property in the possession of Cheryl Bravence,

from the person or immediate presence and against the will of said Cheryl Bravence, all of which acts constitute a violation of Idaho Code Section 18-4001, 18-4003(d).

To which charge, the defendant, Mark Henry Lankford, has entered his plea of not guilty.

INSTRUCTION NO. 22

You are instructed that Idaho Code §18-4001 provides as follows:

> 18-4001. Murder defined. – Murder is the unlawful killing of a human being with malice aforethought. . . .
>
> In addition, Idaho Code §18-4003(d) provides as follows:
>
> 18-4003(d). Any murder committed in the perpetration of, or attempt to perpetrate a robbery is murder of the first degree.

INSTRUCTION NO. 23

You are instructed that the term "perpetrate" means to do or to perform.

INSTRUCTION NO. 24

You are instructed that Idaho Code §18-4002 provides as follows:

> 18-4002. Express and implied malice. – Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied when no considerable provocation appears,

or when the circumstances attending the killing show an abandoned and malignant heart.

INSTRUCTION NO. 24-A

The term malice does not necessarily import ill will toward the individual injured, but signifies rather a general malignant recklessness toward the lives and safety of others. Malice may be shown from the fact that an unlawful killing took place during the perpetration or attempted perpetration of the crime of robbery.

INSTRUCTION NO. 24B

You are instructed that Idaho Code §18-6501 defines robbery as follows:

18-6501. Robbery defined. – Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.

INSTRUCTION NO. 25

You are instructed that Idaho Code §18-6502 provides as follows:

18-6502. Fear which constitutes robbery. – The fear which constitutes robbery may be either:

1. The fear of an unlawful injury to the person or property of the person robbed, or of any relative of his, or member of his family; or,

2. The fear of an immediate and unlawful injury to the person or property of any one in the

company of the person robbed at the time of the robbery.

INSTRUCTION NO. 26

The State must prove all the material elements of the offense charged by the Information beyond a reasonable doubt before the defendant can be found guilty. It is not necessary that every fact and circumstance put in evidence on behalf of the State be established beyond a reasonable doubt, but only that all facts and circumstances in evidence, when taken together, establish beyond a reasonable doubt the material elements of the offense or offenses charged. The material elements of the offense of murder in the first degree in this case are as follows:

COUNT I

1. That, the defendant, Mark Henry Lankford, either personally killed Robert Bravence, a human being, or was a principal in the killing of Robert Bravence.

2. That, the killing was done by the defendant while the defendant was knowingly, wilfully, unlawfully and intentionally engaged in a robbery, or an attempted robbery, of the person or from the immediate presence of Robert Bravence.

3. That, the killing was done with malice aforethought.

4. That, the killing occurred on or about the 21st day of June, 1983.

5. That, the killing occurred in Idaho County, State of Idaho.

COUNT II

1. That, the defendant, Mark Henry Lankford, either personally killed Cheryl Bravence, a human being, or was a principal in the killing of Cheryl Bravence.

2. That, the killing was done by the defendant while the defendant was knowingly, wilfully, unlawfully and intentionally engaged in a robbery, or an attempted robbery, of the person or from the immediate presence of Cheryl Bravence.

3. That, the killing was done with malice aforethought.

4. That, the killing occurred on or about the 21st day of June, 1983.

5. That, the killing occurred in Idaho County, State of Idaho.

INSTRUCTION NO. 27

In every crime or public offense, there must exist a union or joint operation of act and intent. Direct proof of intent is not required since it is a state of mind. Intent is manifested and therefore can be inferred from the facts and circumstances connected with the offense, and the conduct of the person accused thereof or charged therewith.

INSTRUCTION NO. 28

You are instructed that Idaho Code §18-204 provides as follows:

> 18-204. Principals defined. – All persons concerned in the commission of a crime, whether it

> be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed . . . and as such can be found guilty just as if they actually did commit the act constituting the offense.

Based upon that statute, it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime.

INSTRUCTION NO. 29

To "aid and abet" means to assist, facilitate, promote, encourage, counsel, solicit, or invite the commission of a crime.

INSTRUCTION NO. 30

Concerning each count in the information if you do not find the defendant guilty of murder in the first degree as having occurred in the perpetration or attempted perpetration of a robbery you should nevertheless consider whether or not the defendant is guilty of a crime that is necessarily included within the charge of murder;

Those crimes are,

Second degree murder;

Voluntary Manslaughter; and

Accessory to murder;

as are defined elsewhere in these instructions.

INSTRUCTION NO. 31

THE MATERIAL ELEMENTS of the crime of murder in the second degree are as follows:

1. That the defendant, Mark Henry Lankford, did unlawfully and intentionally kill a human being.

2. That Mark Henry Lankford killed with malice aforethought.

3. That the killing took place in Idaho County, Idaho on or about June 21, 1983.

INSTRUCTION NO. 32

Concerning each count charged in the Information, if you find from the evidence beyond a reasonable doubt that the defendant at said time and place unlawfully killed but that the said killing was not done while the defendant was engaged in a robbery or attempted robbery of the person or from the immediate presence of Robert Bravence or Cheryl Bravence, then the defendant should be found guilty of MURDER IN THE SECOND DEGREE.

If you find from the evidence beyond a reasonable doubt that the defendant, at the time and place aforesaid, did unlawfully kill but that said killing was the result of a

sudden quarrel or in the heat of passion on the part of the defendant, and done voluntarily, the defendant should be found guilty of VOLUNTARY MANSLAUGHTER.

INSTRUCTION NO. 33

All persons who, having knowledge that a felony has been committed, unlawfully conceal it from a peace officer, or harbor and protect the person charged with or convicted thereof, are accessories.

Therefore, if you do not find that it has been proven beyond a reasonable doubt that Mark Henry Lankford is guilty of an unlawful killing but that it is proven beyond a reasonable doubt that he had knowledge of the commission of an unlawful killing by Bryan Lankford and did conceal that crime or did harbor and protect Bryan Lankford after he was charged with that crime, then you may find Mark Henry Lankford guilty of being an ACCESSORY TO MURDER.

INSTRUCTION NO. 34

If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetrator of the crime aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.

Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the robbery and in furtherance of the common purpose to commit the robbery, kill a human being, both the person

who committed the killing and the person who aided and abetted him in the robbery are, guilty of Murder of the First Degree.

A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.

However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant can not be convicted of first degree murder.

INSTRUCTION NO. 35

You are instructed when it appears that the defendant has committed a public offense, and there is reasonable grounds of doubt as to which of two or more degrees he is guilty, he can only be convicted of the lowest of such degrees.

INSTRUCTION NO. 35A

Ladies and Gentlemen of the jury, you are instructed that you are not to concern yourselves with the subject of punishment in this case, as that is a matter that is left, by law, to the sole discretion of the court.

INSTRUCTION NO. 36

The State and the defendant both are entitled to the individual opinion of each juror. It is the duty of each of you, after considering all the evidence in the case, to reach a verdict if possible. When you have reached a conclusion, you should not change it merely because one or more of your fellow jurors may have come to a different conclusion, or merely to bring about a unanimous verdict. Each juror should freely and fairly discuss with his fellow jurors the evidence and the deductions to be drawn therefrom. If, after doing so, any juror should be satisfied that a conclusion first reached by him was wrong, he unhesitatingly should abandon that original opinion and render his verdict according to is final decision.

INSTRUCTION NO. 37

The State will now be given the opportunity to present it's summation to you. Following this, the Defense will present it's summation. Finally, the State may present rebuttal argument. Then you shall retire and select one of your number to act as foreman, who will preside over your deliberations. A copy of these instructions, plus all exhibits admitted into evidence, plus suitable forms for your verdict will be delivered to you in the jury room. This is a criminal case and in order to reach a verdict, all twelve jurors must agree to the decision. As soon as all of you have agreed upon a verdict, you shall have the appropriate form dated and signed by your foreman and then shall return with it to this room.

INSTRUCTION NO. 38

You will notice that you have been delivered two packets of verdict forms. Packet #1 concerns Count I. Packet #2 concerns Count II. You are instructed that you are to complete one, and only one, form in each packet.

DENNIS L. ALBERS
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IN THE DISTRICT COURT OF
THE SECOND JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN
AND FOR THE COUNTY OF IDAHO

STATE OF IDAHO,	)	Case No. 20158
Plaintiff,	)	INFORMATION
vs.	)	(Filed Dec. 18, 1983)
MARK HENRY LANKFORD,	)	
Defendant.	)	

DENNIS L. ALBERS, Prosecuting Attorney in and for Idaho County, State of Idaho, for and in behalf of the State of Idaho, comes into the above-entitled Court, in the year of 1983, and gives the Court to understand and be informed that the above-named defendant is held to answer to the District Court for the crime of murder in the first degree, which was committed as follows:

COUNT I

That, on or about the 21st day of June, 1983, in the County of Idaho, State of Idaho, the crime of murder in the first degree, was committed, by the above-named defendant, as follows:

That, the said defendant, Mark Henry Lankford, at the date, time, and place aforesaid, then and there being in the South Fork Area of Idaho County, Idaho, near Santiam Creek, did then and there knowingly, wilfully, unlawfully, intentionally, feloniously, and with malice aforethought, deliberately kill and murder Robert Bravence, by beating such person with an unknown foreign object until said victim, Robert Bravence died of injuries that he then and there sustained. Such acts on the defendant were in the perpetration of a robbery from the person of Robert Bravence, who was then located along the South Fork of the Clearwater Rive [sic] in said county and state, and such beating in the furtherance of the robbery resulted in the death of Robert Bravence aforesaid, and said person sickened and died in the county of Idaho, state of Idaho, on or about the 21st day of June, 1983.

That, the acts of the defendant resulted in property being taken from the presence of Robert Bravence, with the intent to deprive Robert Bravence of such property permanently, and was taken from him by the application to his person of deadly force. All of such acts constitute a violation of Idaho Code §18-4001, 4003(d).

COUNT II

That, the said defendant, Mark Henry Lankford, at the date, time, and place aforesaid, then and there being in the South Fork Area of Idaho County, Idaho, near Santiam Creek, did then and there knowingly, wilfully, unlawfully, intentionally, feloniously, and with malice aforethought, deliberately kill and murder Cheryl Bravence by beating such person with an

unknown foreign object until said victim, Cheryl Bravence died of injuries that she then and there sustained. Such acts on the part of said defendant were in the perpetration of a robbery from the person of Cheryl Bravence, who was then located along the South Fork of the Clearwater River in said county and state, and such beatings in the furtherance of the robbery resulted in the death of Cheryl Bravence aforesaid, and said person sickened and died in the county of Idaho, state of Idaho, on or about the 21st day of June, 1983.

That, the acts of the defendant resulted in property being taken from the presence of Cheryl Bravence, with the intent to deprive Cheryl Bravence of such property permanently, and was taken from her by the application to her person of deadly force. All of such acts constitute a violation of Idaho Code §18-4001, 4003(d).

All of which is contrary to the form of the statute in such cases made and provided and against the peace and dignity of the State of Idaho.

/s/ Dennis L. Albers
DENNIS L. ALBERS
Idaho County Prosecuting Attorney

STATE OF IDAHO)
ss
County of Idaho)

DENNIS L. ALBERS, being first duly sworn, deposes and says: That he knows the contents of the foregoing

Information and verily believes the same to be true as herein set forth.

/s/ Dennis L. Albers
DENNIS L. ALBERS
Idaho County Prosecuting Attorney

SUBSCRIBED AND SWORN to before me this 1st day of December, 1983.

JOYCE C. HART,
Court Clerk

By: /s/ Starla Coffman
Deputy Clerk

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(2)

No. 07-7

8-16-2007

IN THE SUPREME COURT OF THE UNITED STATES

A.J. ARAVE,

Petitioner,

vs.

MARK HENRY LANKFORD,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Is certiorari appropriate to review a Court of Appeals decision which properly stated and applied the relevant standard of prejudice under *Strickland v. Washington*, 466 U.S. 668 (1984)?

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1. PARTIES TO THE PROCEEDING BELOW

Petitioner Arave is the warden of the Idaho Maximum Security Institution.

Respondent Mark Lankford is a prisoner in that institution.

2. STATEMENT OF THE CASE

Petitioner, in seeking certiorari before this Court, does not challenge the Court of Appeals' conclusion that the attorney provided deficient performance at trial. Rather, Petitioner asserts that there was no prejudice to Mr. Lankford and that the Court of Appeals applied a lesser standard than that set forth in *Strickland v. Washington*, 466 U.S. 668 (1984) and its progeny. As discussed below, a simple examination of the decision belies that argument.

Respondent Mark Lankford, hereinafter "Mark," was convicted of first degree murder and sentenced to death in Idaho County, Idaho in 1984. He was charged along with his brother Bryan Lankford, who was tried separately and testified against Mark. As the opinion notes, Bryan recanted his trial testimony and provided information that supports the conclusion that Mark did not participate in the robbery or murders. (*Lankford v. Arave*, 468 F.3d 578 (9th Cir. 2006) (Petition App. at 1.)

At trial Mark was represented by an inexperienced court-appointed attorney who had never handled a murder case, much less a capital case. The Court of Appeals described the attorney's experience in the following terms:

> FitzMaurice was a part-time public defender who had, it seems, only tried one previous major felony: a case of cattle-rustling. He had never defended a murder case, and had no training in capital defense. He delivered no

> opening statement to the jury, and called no witnesses. He did not secure a second attorney, an investigator (except for a fingerprint analyst), an independent pathologist, or an independent psychologist to aid in preparing a defense.

Lankford v. Arave, 468 F.3d at 585, fn. 3.

On appeal and in the consolidated state post-conviction petition, Mark continued to be represented by the same court-appointed counsel. As a result, the initial state petition did not raise any allegations of violations of the Sixth Amendment right to effective assistance of counsel, and his conviction and sentence were affirmed in the state courts.

Mark was appointed new and separate counsel to assist in the filing of a federal habeas corpus petition. A petition was thereafter filed in 1992. Mark returned to state court to raise claims involving his Sixth Amendment right to counsel; however, the State asserted that such claims were barred by the application of an Idaho statute barring claims not raised within forty-two days of the conviction and sentence. See, I.C. § 19-2719. As a result of the State's assertion of procedural default, Mark's post-conviction petition was denied on procedural grounds, and the state court did not examine the merits of the claims. See, *Lankford v. State*, 897 P.2d 991 (Idaho 1995).

The federal district court originally upheld the validity of the state procedural rule, and Mark appealed. However, the State stipulated to a remand before the appeal could be decided and after the decision in *Hoffman v. Arave*, 236 F.3d 523 (9th Cir. 2001), which held that the Idaho procedural default rule was not a bar to consideration of the Sixth

Amendment right to effective assistance of trial counsel claims. (Respondent's Appendix, Docket of Ninth Circuit Court of Appeals, No. 99-99015, hereinafter "Resp. App.," at 6.)

Thereafter, the district court conducted an evidentiary hearing and found deficient performance by counsel but held there was no prejudice. Mark appealed. At oral argument the panel indicated to the parties that a reversal was likely and that the parties might take advantage of the court's mediation program. The parties agreed to a mediation but did not achieve a settlement. (Resp. App. at 10-11.) Thereafter, the Court of Appeals unanimously reversed, finding at least one ground of deficient performance[1] and prejudice. "We conclude there is a 'reasonable probability' that, with proper instructions on the question of corroboration, the jury would not have convicted Mark of first degree murder. *Strickland,* 466 U.S. at 694." *Lankford v. Arave*, 468 F.3d at 589.

The State filed a Petition for Rehearing and Rehearing En Banc on January 3, 2007. That petition was denied without a request for a response on January 29, 2007. The panel judges voted to deny the petition for rehearing and "[t]he full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc." (Petitioner's App. at 58.) The Petition for Writ of Certiorari now pending before this Court was then filed on June 28, 2007.

---

[1]"We find FitzMaurice's error in drafting jury instructions an adequate grounds for reversal. Although we do not reach the other grounds on which Mark contends that FitzMaurice rendered ineffective assistance of counsel, the evidence Mark has presented in support of those claims reinforces our judgment that Mark was prejudiced in this case." *Id.* at 589.

3. PETITIONER CITES NO REASON UNDER RULE 10 FOR THE GRANT OF CERTIORARI

A grant of certiorari is made "only for compelling reasons." Rule 10, Rules of the Supreme Court. In this case, the Petition does not assert one valid reason under Rule 10 for the granting of certiorari in this case. The opinion of the Court of Appeals is not in conflict with decisions of other circuits, nor does the case raise an important issue of federal law that has not been, but should be, decided. See, Rule 10 (a), (c). Petitioner simply disagrees with the Court of Appeals' application of the properly-stated rule in *Strickland*. This is not grounds for the exercise of this Court's supervisory power.

Petitioner concedes that the Court of Appeals "cited the appropriate standard for prejudice." (Petition at 12.) While Petitioner may disagree with the manner in which that court applied the law in this case, "[a] petition for certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10, Rules of the Supreme Court. Petitioner parses a few words in the opinion to support its claim that the Court of Appeals disregarded the very legal precedents it cited, and, without reference to these guiding principles set forth in the Rules of this Court, requests review here.

4. THE PREJUDICE STANDARD SET OUT IN *STRICKLAND* WAS PROPERLY ADOPTED AND APPLIED IN THIS CASE

Extracting a few words from a lengthy opinion in which the State concedes the appellate court "cited the appropriate standard for determining prejudice" under *Strickland*,

the State argues that these few scattered words – "seem," "appears," and "might" – "significantly reduced the *Strickland* standard to 'a mere possibility' rather than a reasonable likelihood." (Petition at 12.) However, an examination of the detailed review of the law and the facts conducted by the unanimous panel opinion, authored by Judge Bybee and supported by the denial of the Petition for Rehearing En Banc, demonstrates the fallacy of the State's argument.

First, there can be no question that the appellate court understood and applied the proper standard in this case.

> "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." *Id.* at 693. To reverse we must find a "reasonable probability that . . . the result of the proceeding would have been different" had the erroneous instruction not been given. *Id.* at 694; see also *Span*, 75 F.3d at 1390.

Lankford v. Arave, 468 F.3d at 585.

> The error here is a more fundamental one. The jury was instructed to overlook the question of corroboration, and we must ask whether, given proper instructions, there is a "reasonable probability" that the jury would have found Bryan's testimony unsupported. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Id. at 588.

> We conclude there is a "reasonable probability" that, with proper instructions on the question of corroboration, the jury would not have convicted Mark of first degree murder. *Strickland*, 466 U.S. at 694.

Id. at 589.

The argument that the Court of Appeals mis-interpreted or undermined the standard set forth in *Strickland* must be rejected.

Second, contrary to the allegation in the Petition, the appellate court considered the impact of the instructions as a whole.

> And we must consider the instructions "as a whole" in evaluating the magnitude of the error. *Middleton v. McNeil*, 541 U.S. 433, 437, 124 S.Ct. 1830, 158 L.Ed.2d 701 (2004). "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Boyde v. California*, 494 U.S. 370, 378, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990) (internal quotation marks omitted); *see also Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Accordingly, Mark need not establish error for certain. "[A] defendant need not establish that the jury was more likely than not to have been impermissibly [influenced] by the instruction." *Boyde*, 494 U.S. at 380. "If the charge as a whole is ambiguous, the question is whether there is a *reasonable likelihood* that the jury has applied the challenged instruction in [an impermissible] way . . . ." *Middleton*, 541 U.S. at 437 (internal quotation marks omitted) (emphasis added).

Id. at 585.

> Considering the instruction "in the context of the instructions *as a whole* and the trial record" does not inspire confidence in the reliability of Mark's verdict. *Estelle*, 502 U.S. at 72.

Id. at 587 (emphasis added).

To argue that the Court of Appeals did not understand its responsibility or the applicable law regarding consideration of prejudice from counsel's request for the erroneous instruction verges on the frivolous.

Finally, in applying the facts to the law, the court concluded that "It is hard to imagine a case in which such an instructional error could have caused more damage." *Id.* at 586.

Given the clear language of the opinion, the argument that the appellate court applied a lesser standard than that established by this Court must be rejected and is certainly not worthy of review by this Court. If an appellate court cites the relevant law and then applies it in a well-reasoned manner, there is no need for further review. There is no reason for the grant of certiorari on this question.

5. PETITIONER'S ALLEGATION THAT THE OPINION "DESTROYS PRINCIPLES OF COMITY AND FEDERALISM" IS NOT WORTHY OF REVIEW

Without citation to a single federal case or contrary legal authority, the State argues that a "misstatement of Idaho state law" (Pet. at 16) requires review by this Court, as the opinion "destroys the principles of comity and federalism." (Pet. at 20-21.) Such hyperbole, without any legal support, does not warrant consideration by this Court.

For over twenty years, the State has fought the attempts by Mark to have his Sixth Amendment issues determined on their merits. At each step in the state courts, the State raised procedural hurdles to a decision on the merits, thereby preventing the state courts from asserting their opinions on the merits of the issues. Now, after the federal courts have applied straightforward legal principles, the State argues that the opinion violates some notion of comity and federalism. There is no claim that Mark failed to exhaust his

Sixth Amendment claims or provide the state courts an opportunity to fairly address these issues.

Given the history of this case, the State has waived any right to raise these arguments at this late date. This argument was never raised in the briefs before the district court or the Court of Appeals and was not addressed in the State's Petition for Rehearing and Rehearing En Banc. (Resp. App. at 12-20.)

Having denied the state courts an opportunity to reach the merits of these claims by asserting procedural default throughout the state court proceedings, the State now argues that the federal court's consideration of state law to the merits of this case somehow "destroyed principles of comity and federalism." (Pet. at 17-21.) The State, by its own actions, prevented the state courts from considering these claims and now argues that the federal court's analysis is flawed.

However, the appellate court properly considered the impact of the state law, especially the significance of the role of accomplice testimony and the reasons for the strict Idaho law on corroboration of an accomplice. Moreover, the Court of Appeals examined a number of cases from the state courts in Idaho noting that the question of sufficient evidence of corroboration is measured with a different standard than questions arising from an improperly instructed jury. *Lankford v. Arave*, 468 F.3d at 587-89.

Petitioner argues, again without citation, that since the trial court did not *refuse* to give corroboration instructions, it is proper to analyze counsel's admitted deficient performance under a more stringent sufficiency of the evidence test. (Pet. at 16-17.) The

Court of Appeals applied the correct standard for determining prejudice where improper instruction was the result of trial counsel's deficient performance: is there a reasonable probability of a different result had the jury been properly instructed. In this light, the Court of Appeals applied the correct standard, and thus at most, Petitioner simply disagrees with the opinion's conclusion.

The State next argues that the appellate court did not understand that this matter was charged as a felony-murder and that there needed only to be corroboration of the robbery. However, the appellate court knew Mark was charged with felony-murder, as one of the petition's claims which the court did not have reach was that the malice instruction in felony-murder violated *Sandstrom v. Montana,* 442 U.S. 510 (1979); and he never claimed that he was charged or convicted of any other type of first degree murder. Moreover, if there is any doubt whether the appellate court understood this assertion, the State's petition for rehearing and rehearing en banc filed on January 3, 2007, clarified the doubt when it argued that the panel opinion did not consider the felony-murder charge. (Resp. App. at 12.) Twenty-six days later and without even requesting a response, the petition was denied without a vote of the entire court.

Finally, just as with the actual murder, there similarly was not sufficient corroboration, in light of the incorrect jury instruction, for Bryan's testimony that Mark was involved in the robbery. In essence, Petitioner contends that the factual findings of the opinion are erroneous, which is not a reason to grant certiorari. Rule 10. The Court of Appeals properly concluded that there was a reasonable probability of a different result had

trial counsel not requested the erroneous instruction. Petitioner argues, as he did in the Petition for Rehearing, that the "time-line" and the testimony of Roy Ralmuto provides sufficient corroboration to overcome the erroneous instruction. But the evidence relied upon by the State would apply equally to whether Mark killed or robbed the Bravences; and reliance on Ralmuto's testimony as to the supposed statement made by Mark months after the murders is suspect and insufficient corroboration of Mark's involvement in either the robbery or the murder.

First, the fact that Mark was in the area does not connect him to the commission of the robbery. While his prints were later found on items within the van, the items with his prints were newspapers unrelated to the alleged date of the robbery and murders. Petitioner does not mention that Bryan's fingerprints were on other items, nor that Bryan had carved his initials onto a knife he had taken from the Bravences.

Second, the alleged statement to Ralmuto is not an admission to either the robbery or murder but rather a generalized statement about living in the woods. Indeed, there had been testimony that the Lankford brothers had gone to Idaho specifically to leave their prior life behind, and the statement does not connect Mark to the commission of the offense. Further, Ralmuto was a known sexual deviant who hated Mark because Mark had tried to stop Ralmuto from molesting Mark's brothers, including Bryan. Thus Ralmuto had a reason to lie about Mark on Bryan's behalf.

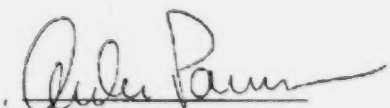
In order to find Mark guilty of the robbery, the jury would have had to believe Bryan, as there was little or no evidence connecting Mark to the robbery or showing that the

killings occurred during the commission of the robbery. Moreover, the Court of Appeals relied extensively on other evidence adduced at the evidentiary hearing in federal district court which demonstrated that Bryan was lying in his testimony against Mark and which supported Bryan's recantation exonerating Mark. As the appellate opinion makes clear, there is a reasonable probability of a different result had Mark been represented by effective counsel, had the jury been properly instructed on the law, and in light of the weakness of the prosecution's case and considering the evidence counsel failed to present to the jury. Certiorari on this question is not warranted.

6. CONCLUSION

The decision of the Court of Appeals is fact intensive, reasonably considered, and supported by other decisions regarding the duties of competent counsel in capital trials. The opinion stated the relevant legal principles, applied the facts to that law, and concluded that Mark was denied the effective assistance of counsel as guaranteed by the Sixth Amendment. There is no "compelling reason" to review this unanimous decision which orders that, after twenty-three years, the State of Idaho must provide Mark Lankford a fair trial where he is represented by competent counsel in this capital case.

Dated: August 16, 2007



Andrew Parnes
Counsel of Record for Respondent
Mark Henry Lankford

APPENDIX

Search for Case

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Help

General Docket
US Court of Appeals for the Ninth Circuit

Court of Appeals Docket #: 99-99015 Filed: 5/21/99
Nsuit: 3535 habeas - death penalty (Fed)
Lankford v. Arave
Appeal from: District of Idaho (Boise)

- -

Case type information:
1) death penalty petition
2) state
3) death habeas corpus

- -

Lower court information:

District: 0976-1 : CV-92-00321-S-WFN
court reporter: Verlene Nelson, Court Reporter
presiding judge: Wm. Fremming Nielsen, Senior Judge
Date Filed: 8/17/92
Date order/judgment: 5/5/99
Date NOA filed: 5/13/99
Date of cert pc: 5/14/99

- -

Fee status: in forma pauperis

- -

Prior cases:
None
Current cases:
None

Docket as of June 7, 2007 11:15 pm Page 1

99-99015 Lankford v. Arave

MARK HENRY LANKFORD Petitioner - Appellant	Andrew H. Parnes, Esq. FAX 208/726-1187 208/726-1010 [COR LD NTC cja] P.O. Box 5988 Ketchum, ID 83340 Charles F. Peterson, Esq. FAX 208/336-2059 208/342-4633 Suite 420 [COR LD NTC cja] PETERSON LAW OFFICES 913 W. River Boise, ID 83702
v.	
ARVON J. ARAVE, Warden, Warden, Idaho State Correctional Institution Respondent - Appellee	Kenneth Robins FAX 208 208/334-2400 [COR LD NTC dag] L. LaMont Anderson, Esq.

00001

FAX 208/334-2942
208/334-4542
[COR LD NTC dag]
AGID - OFFICE OF THE IDAHO
ATTORNEY GENERAL (BOISE)
P.O. Box 83720
Boise, ID 83720-0010

99-99015 Lankford v. Arave

MARK HENRY LANKFORD

Petitioner - Appellant

v.

ARVON J. ARAVE, Warden, Warden, Idaho State Correctional Institution

Respondent - Appellee

99-99015 Lankford v. Arave

5/21/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. (eu)
5/21/99	Filed Appellant Mark Henry Lankford's application for stay of execution pending appeal, served on 5/20/99 [3678763] . (MOATT-ME) [99-99015] (eu)
5/28/99	Filed order (Mary M. SCHROEDER, Ferdinand F. FERNANDEZ, William A. FLETCHER,): Aplt's motion for a stay of execution pending disposition of this appeal is granted. Aplt shall designate the reporter's transcript by 7/7/99; the opening brief and excerpts of record are due 8/17/99; the appellees' brief is due 9/16/99; and the optional reply brief, if any, shall be filed within fourteen days from service of the aple's brief. The briefs and excerpts of record shall conform to Ninth Circuit Rule 32-4 (1999). [99-99015] (eu)
7/20/99	Filed motion for extension of time to file Reporter's Transcript until 8/14/99 and deputy clerk order :(Deputy Clerk: JC) granting court reporter Verlene Nelson's an extension to 8/14/99 to file transcripts; appellant's opening brief is due 9/23/99; appellee's brief is due 10/25/99; and the aplt's reply brief, if any, may be file 14 days from service of the aple's brief. All briefs must conform to the provisions set forth in Federal Rules of Appellate Procedure 32 and Circuit Rules 32-1 and 32-4. (Motion recvd 7/16/99) [99-99015] (eu)
7/20/99	Entered appearance of Verlene Nelson as Court Reporter in this case. [99-99015] (eu)
9/16/99	Filed Appellant Mark Henry Lankford's motion for extension of time to file appellant's opening brief until 11/7/99, served on 9/15/99. [99-99015] (eu)

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9/27/99	Filed Appellee A.J. Arave's notice of non-objection to motion for extension of time to file aplt's opening brief, served on 9/22/99. [99-99015] (eu)
10/1/99	Filed order (Deputy Clerk: JC) Aplt counsel's unopposed motion for an extension of time to file the opening brief is granted and briefing will proceed as follows: The aplt's opening brief and excerpts of record are now due 11/9/99; the aple's brief is due 12/9/99; the aplt may file a reply brief 14 days from service of the aple's brief. All briefs must conform to the provisions set forth in FRAP 32 and Circuit Rules 32-1 and 32-4. (phoned at 11:45 a.m.) [99-99015] (eu)
11/2/99	Filed Appellant Mark Henry Lankford's motion for extension of time to file aplt's opening brief until 11/16/99, served on 11/1/99. [3784518] [99-99015] (eu)

11/3/99	Filed order (Deputy Clerk: EU) Aplt counsel's unopposed motion for a second extension of time to file the opening brief is granted and briefing will proceed as follows: The aplt's opening brief and excerpts of record are due 11/16/99; the aple's brief is due 12/16/99; the aplt may file a reply brief 14 days from service of the aple's brief. All briefs must conform to the provision set forth in FRAP 32 and Circuit Rules 32-1 and 32-4. Any further requests fro extension of time to file aplt's opening brief will be view with disfavor. (phoned at 10:30 a.m.) [99-99015] (eu)
11/16/99	Filed Appellant Mark Henry Lankford's motion for leave to file oversized opening brief, served on 11/16/99. (DP) [3792480] [99-99015] (eu)
11/16/99	Received Appellant Mark Henry Lankford's original and 15 copies opening brief of 170 pages or 40,276 words and 5 copies of excerpts of record in 7 volumes (Informal: n) deficient:y (motion for leave to file oversized pending) Served on 11/16/99. (DP) [99-99015] (eu)
11/18/99	Criminal Justice Act voucher sent (Voucher # Electronic) to E. Evans Young for Appellant Mark Henry Lankford and to Andrew H. Parnes for Appellant Mark Henry Lankford. (copy Casefile) [99-99015] (eu)
11/26/99	Filed Appellee A.J. Arave's response to motion to file oversize brief, served on 11/24/99. (DP) [99-99015] (eu)
11/30/99	Filed Appellant Mark Henry Lankford's reply in response to respondent's opposition to motion to file oversized brief; served on 11/29/99. (MOATT-DP) [99-99015] (eu)
12/9/99	Filed atty Andrew H. Parnes's ex parte motion for interim CJA payment (APPELLATE COMMISSIONER w/ CJA voucher) (sa)
12/14/99	Filed A.J. Arave's motion for extension of time to file brief until after the court rules on pending motion to dismiss appeal and affidavit in support, served on 12/13/99. (MOATT-DP) [3809889] (eu)

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12/28/99	Filed atty E. Evans Young's ex parte motion for interim CJA payment (APPELLATE COMMISSIONER w/ CJA voucher) (sa)

99-99015 Lankford v. Arave

1/6/00	Filed order (Appellate Commissioner) Aplt's motion to file an oversized brief is granted in part and denied in part. aple's motion to strike the opening brief, received 11/16/99 is granted. Aple's motion to dismiss the appeal is denied. Aple's motion to extend the time to file an answering brief is denied as moot in light of the new briefing schedule. The briefing is reset as follows: Aplt's opening brief, not to exceed 28,000 proportionately spaced words or 100 pages of monospaced typeface but otherwirse conforming to FRAP 32, is due 1/31/00; aple's brief is due 3/13/00; the optional reply brief, if any, is due 14 days from service of the aple's brief. Further time extensions to file the brief will be disfavor. (phoned at 10:30 a.m.) [99-99015] (eu)
1/18/00	Filed certificate of record on appeal RT filed in DC 1/12/00. [99-99015] (eu)
1/31/00	Filed original and 15 copies Appellant Mark Henry Lankford opening brief (Informal: n) 123 pages and five excerpts of record in 7volumes; served on 1/31/00 [99-99015] (jc)
1/31/00	Filed Appellant Mark Henry Lankford's motion to expand record on appeal. [99-99015] served on 1/31/00 [3839296] (MOATT-ME) [99-99015] (jc)
2/4/00	Filed order MOATT (ME) referring aplt's motion to expand the record and any response to the merits panel for disposition. [99-99015] (jc)
2/15/00	Filed order (Appellate Commissioner): The mtn of aplt's apptd csl Andrew Parnes and E. Evans Young for interim payments is granted... Csl may each submit a second interim voucher after the rpy brf is filed, a third interim vch if csl file a petition for rehearing or suggestion for rehearing en banc or a response to such a petition, and a fourth interim vch if csl file a petition for writ of cert or a response to such a petition... [99-99015] (eu)
2/15/00	Filed Appellee A.J. Arave's response to aplt's motion to expand record, served on 2/14/00. (Records for merits panel for disposition, see order of 2/4/00) [99-99015] (eu)
3/8/00	Filed A.J. Arave's motion for an extension of time to 4/27/00 to file appellee's brief and affidavit in support, served on 3/7/00. (DPC) (eu)
3/22/00	Filed order (Deputy Clerk: JC) Aple's unopposed motion for an extension of time to file the aple's brief is granted and the aple's brief is now due 4/27/00. The aplt may file a reply brief 14 days from service of the aple's brief. [99-99015] (eu)

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99-99015 Lankford v. Arave

4/24/00	Filed A.J. Arave's motion for second extension of time to file appellee's brief until 5/18/00 and affidavit in support, served on 4/20/00. (DPU) (eu)
4/25/00	Filed order (Deputy Clerk: JC) Aple's motion for an extension of time to file the aple's brief is granted and the aple's brief is now due 5/18/00. The aplt may file a reply brie 14 days from service of the aple's brief. (phoned csl) [99-99015] (eu)
5/18/00	Received original and 15 copies of A.J. Arave's brief of 122 pages or 26,459 proportionately spaced typeface words; and five copies of supplemental excerpts of record in 1 volume; served on 5/17/00 deficient: (oversized awaiting on motion for leave to file oversized) [99-99015] (eu)
5/18/00	Filed "faxed" A.J. Arave's motion for leave to file oversized brief and declaration in support thereof, served on 5/18/00. (DP-STAFFATTY mtn and brief) [3913142] (eu)
5/25/00	Filed order (Deputy Clerk: me) granting appellee's motion to file oversized brief [3913142-1] [99-99015] (nc)
5/25/00	Filed original and 15 copies appellee A.J. Arave's 125 pages brief, 1 Exc. vols: ; served on 5/17/00 [99-99015] (nc)
5/31/00	Filed Appellant Mark Henry Lankford's motion for an extension of time to 6/26/00 to file his reply brief, served on 5/30/00. (DPU) [99-99015] (eu)
6/12/00	Filed order (Deputy Clerk: EU) Aplt's motion for 18 day extension of time to file reply brief is granted. The reply brief shall be filed on or before 6/23/00. [99-99015] (eu)
6/27/00	Filed Appellant Mark Henry Lankford's motion for leave to file oversized reply brief, served on 6/23/00. (DP-STAFF/ATTY) [99-99015] (eu)
6/27/00	Received original and 15 copies Mark Henry Lankford's reply brief of 11,231 words; served on 6/23/00. (oversized; motion pending for leave to file)(DP-STAFF/ATTY) [99-99015] (eu)
6/29/00	Filed order MOATT (ME) Appellant represents that his reply brief is comprised of 11,231 words. Appellant's motion to file an oversized reply brief is granted. [99-99015] (eu)
6/29/00	Filed original and 15 copies Mark Henry Lankford's reply brief of 11,231 words; served on 6/23/00. (originally rec'd on 6/27/00)(RECORDS) [99-99015] (eu)

99-99015 Lankford v. Arave

6/29/00	Received Andrew H. Parnes for Appellant Mark Henry Lankford letter dated 6/26/00 re: requesting oral argument to be set on an expedited basis. (Calendar Unit) [99-99015] (eu)
1/29/01	Received Gilda Howard's letter re: appeal 99-99015, pertaining to the murder of her son and daughter in law.

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(Casefiles) [99-99015] (eu)

1/30/01 Calendar check performed [99-99015] (aw)

2/12/01 CALENDARED: PORTLAND Nov 8 2001 9:00 am [99-99015] (aw)

2/12/01 Received letter from Andrew Parnes for Appellant Mark Henry Lankford re calendaring of case and availability. (Calendar) [99-99015] (eu)

2/14/01 Filed Mark Henry Lankford's additional citations, served on 2/13/01. (faxed to panel) [99-99015] (eu)

2/23/01 Filed order (Deputy Clerk: EU) The parties are directed to file supplemental briefs addressing the effect, if any, on the analysis in this case of the case of Hoffman v. Arave, 236 F.3d 523 (9th Cir. 2001). Aplt's brief shall be filed within 21 days of the date of this order, and aple's response in a like time after filing of aplt's brief. No reply brief will be filed. All briefs shall not exceed ten pages or 2,800 words in length and shall conform to the format requirements of Circuit Rule 32-3. The briefs may be in the form of letters to the clerk of this court, with the following notation conspicuosly placed on the first page: "Letter brief by order of the court" A copy of this order is also to be attached to the letter briefs. [99-99015] (eu)

3/14/01 Filed original and 4 copies Appellant Mark Henry Lankford supplemental brief (stipulation re limited remand) of 2 pages, served on 3/12/01. (FEDEX TO PANEL) [99-99015] (eu)

3/15/01 Filed order (Deputy Clerk: EU) Aplt's motion to expand the record is granted. [99-99015] (eu)

3/27/01 Filed order (Deputy Clerk: JC) The panel to which this case is assigned has directed the entry of the following order. The parties' stipulation for limited remand is GRANTED. This case is REMANDED to the district court for further proceedings. In complying with this mandate, the district court may enter such orders as it deems appropriate, including, without limitation, vacating or amending prior orders or judgments. The court may hold such hearings as it deems appropriate, if any, including evidentiary hearings. Any appeal(s) from further orders of the district court will be consolidated with this appeal. A briefing schedule will be set by order of this court. The oral argument date is vacated and the case shall be reset for hearing after any subsequent briefing is complete. [99-99015] (eu)

5/16/03 Received copy of District Court Memorandum Decision and Order on Remand filed on 5/16/03: ...Lankford has failed to set forth a constitutional violation which would entitle him to relief...(DP/STAFF-ATY) [99-99015] (eu)

5/29/03 Filed order (Appellate Commissioner: PLS) Given the posture of this case, the Clerk shall strike all briefs previously filed. Because the USDC granted a Certificate of Probable Cause before the Supreme Court decided Slack v. McDaniel, 529 U.S. 473, 481-82 (2000), this case is remanded to the

district court for the limited purpose of allowing the district court an opportunity at its earliest convenience to rule on what issue or issues in this case meet the standard for a COA. See US v. Asrar, (cite). A briefing schedule will be set after the district court issues its ruling. Limited remand to USDC for COA ruling. (served to csl and usdc) (DP-Staff/Aty) [99-99015] (eu)

6/29/04 Filed USDC's response to 5/29/03 court's order on limited remand to USDC re: issues on COA. (Documents entitled "Order Re: Certificate of Appealability" "Petitioner's Supplemental Notice of Appeal" Filed in the USDC on 6/28/04. (DP/STAFF-ATTY) [4749766-1] [99-99015] (eu)

6/30/04 FILED CERTIFIED RECORD ON APPEAL: 4 CLERK'S RECORDS & 5 REPORTER'S TRANSCRIPTS.(ORIGINAL) BOXCAR # 10 [99-99015] (sd)

7/19/04 Filed order MOATT(ME) This case has returned following a limited remand to the district court. All briefs previously filed on appeal were striken by the Appellate Commissioner's 5/29/03 order. The briefing schedule for this appeal is set as follows: Aplt's opening brief and excerpts of record are due 9/16/04; Aple's responsive brief and its excerpts of record, if any, are due 11/15/04; Aplt's optional reply brief, if any, is due within 21 days from service of Aple's brief. (Faxed/Served to Csls) [99-99015] (pi)

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8/2/04 Filed Appellant Mark Henry Lankford's Motion to Broaden the Certificate of Appealability; served on 07/30/04. (DP-Staff/Atty)[5138192] [99-99015] (pi)

8/4/04 Filed order MOATT (ME) Appellant's motion for a broader certificate of appealability is denied as unnecessary. Counsel is directed to refer to Ninth Circuit Rule 22-1(e). See 9th Cir.R. 22-1(e) (Rec. 1-1-04). The briefing schedule set in the deputy clerk's July 19, 2004 order remains in place. (Faxed/Served Csls) [99-99015] (pi)

9/10/04 Filed Appellant Mark Henry Lankford's Motion for extension of time to 10/14/04 to file opening brief; served on 9/9/04. (DP-Staff/Atty) [5176033] [99-99015] (pi)

9/13/04 Filed order MOATT(ME) Appellant's unopposed motion for a 28-day extension of time, until October 14, 2004, to file his opening brief is granted. Aple's answering brief is due 12/14/04. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/faxed/served Csls) [99-99015] (pi)

10/5/04 Filed Appellant Mark Henry Lankford's motion for extension of time to 11/9/04 to file his opening brief; served on 10/1/04. (DP-Staff/Atty) [99-99015] [5198565] [99-99015] (pi)

10/15/04 Filed order MOATT (ME) Appellant's unopposed motion for a second extension of time, until 11/9/04, to file his opening brief is granted. Aple's answering brief is due 01/11/05. Appellant's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/faxed/Served Csls) [99-99015] (pi)

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11/9/04	Filed Appellant Mark Henry Lankford's motion to file oversized opening brief of 27,959 words (129 pages); served w/ proposed brief and attached excerpts of record in 8 volumes; served on 11/8/04. (DP-Staff/Atty) [99-99015] [5231461] [99-99015] (pi)
11/12/04	Filed order MOATT (ME) Appellant's motion to file an oversized opening brief, which he as certified contains no more than 27,959 words, is granted. Aple's answering brief, subject to the same size limitations, is due 01/14/05. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served to Csls) [99-99015] (pi)
11/12/04	Filed oversized original of Appellant Mark Henry Lankford's opening brief of 129 pages or 27,959 words and five copies of excerpts of record in 8 volumes; served on 11/8/04. ***(NOTE: See 11/12/04 Order Granting Mtn to File Ovsz Brief Phoned Csls Requesting for remaining copies of brief to be overnighted to this Court) [99-99015] ****11/15/04 Rcv'd additional copies of brief***** (pi)

99-99015 Lankford v. Arave

12/15/04	Received (obtained from PACER) copy of District Court order filed on 1/14/02 appointing Charles Peterson as substitute counsel of record in place of E. Evans Young (CASE FILES) (Filed by Hon. Wm. Nielsen) [99-99015] (sa)
12/15/04	Criminal Justice Act voucher sent () to Charles F. Peterson for Appellant Mark Henry Lankford [99-99015] (sa)
12/28/04	CJA voucher received and returned to counsel Charles Peterson: premature and incomplete (sa)
1/7/05	Filed Aple Arvon J. Arave's Motion For Extension of Time to 2/15/05, to File Answering Brief; w/attached Affidavit of Support to Motio; Served on 1/6/05. (DP-Staff/Atty) [99-99015] [5287649] (pi)
1/7/05	Filed order MCATT (ME) Appellee's unopposed motion for an extension of time, to 2/15/05, to file its answering brief is granted. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Faxed/Served Csl) [99-99015] (pi)
2/8/05	Filed Aple Arvon J. Arave's Motion for Extension of Time to 3/18/05 to File Aple's Brief; with affidavit in support of motion; served on 2/7/05. (Served to DP-Staff/Atty & App.Com) [5322817] (pi)
2/14/05	Filed order MCATT (ME) Appellee's unopposed motion for a second extension of time, to 3/18/05, to file its answering brief is granted. Appellant's optional reply brief, if any is due within 21 days from service of the answering brief. (Phoned/Served Csl) [99-99015] (pi)
3/8/05	Filed Aple Arvon J. Arave's Motion for Extension of Time to 4/8/05 to File Aple's Brief with attached affadavit; Served on 3/7/05. (DP-Staff/Atty) [99-99015] [5354652] (pi)

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3/9/05 Filed order MOATT (ME) Aple moves for a 21-day extension of time, to April 8, 2005, to file the answering brief. Aple's third unopposed motion for extension of time to file the answering brief is granted. Any further extension of time to file the answering brief is disfavored. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served Csl) [99-99015] (pi)

3/31/05 Filed Aple A.J.Arave's Motion for Extension of Time to 4/22/05 to File Aple's Brief with attached affidavit of support to motion; served on 3/30/05. (DP-Staff/Atty) [5383448] (pi)

99-99015 Lankford v. Arave

4/5/05 Filed order MOATT (ME) Appellee moves for a fourth extension of time to file the answering brief. Aple's unopposed motion is granted. Aple's brief is now due on 4/22/05. Aplt's optional reply brief, if any, is due within 21 days from service of the answering brief. (Faxed/Served to Csl) [99-99015] (pi)

4/25/05 Filed Respondent's Motion to File Oversized Brief (30,660 words or 141 pages) with attached affidavit of support; served on 4/22/05. (DP-Staff/Atty) [99-99015] [5411759] (pi)

4/26/05 Received Respondent's Oversized Brief of 141 pages/ 30660 words; Served on 4/22/05. (Motion to File Oversized Pending w/ DP-St/Atty) (DP-Staff/Atty) [99-99015] (pi)

4/27/05 Filed order MOATT (ME) Appellee's motion to file oversized answering brief comprised of 30,660 words is denied. The Clerk shall strike the proposed answering brief received by this Court on April 25, 2005. Aple's replacement answering brief, not to exceed 27,959 words as stated in the deputy clerk's 11/12/04 order, is due May 18, 2005. The optional reply brief, if any, is due within 21 days from service of the answering brief. (Phoned/Faxed/Served Csl) [99-99015] (pi)

5/16/05 Filed original and 15 copies of appellee Arvon J. Arave's 130 pages and (21,959 words) ; with 5 copies of excerpts of record; ; served on 5/12/05. (Casefiles & Records Unit) [99-99015] (pi)

5/31/05 Filed Appellant Mark Henry Lankford's Motion for Extension of Time to 7/1/05 to file his reply brief; served on 5/24/05. (DP-Staff/Atty)[5454698] [99-99015] (pi)

6/7/05 Filed order MOATT (ME) Appellant's unopposed motion for an extension ofotime, until 7/1/05 to file his reply brief is granted. [5454698-1] (FAXED/SERVED to Csl) [99-99015] (pi)

6/23/05 Filed Appellant Mark Henry Lankford's Motion for Extension of Time to 7/13/05 to File Reply Brief; Served on 6/22/05. (DP-Staff/Atty) [99-99015] [5476270] [99-99015] (pi)

6/24/05 Filed order MOATT (ME) Appellant's unopposed motion for second extension of time, until July 13, 2005, to file his reply brief is granted. (Phoned/Faxed/Served Csl) [99-99015] (pi)

00009

7/14/05 Filed Appellant Mark Henry Lankford's motion for leave to file an oversized brief, (motion is accompanied by one copy of proposed reply brief of 53 pgs.) served on 7/13/05. (DP-Staff/Atty) [99-99015] (eu)

99-99015 Lankford v. Arave

7/18/05 Filed order MOATT (ME) Appellant's motion to file an oversized reply brief, comprised of 11,709 words, is granted. (Phoned/Faxed Csl) [99-99015] (pi)

7/18/05 Filed original of Petitioner's oversized reply brief of 53 pgs or 11,709 words; served on 7/13//05. (See 7/18/05 Order granting motion to file oversized brief; contacted Petitioner's Csl, to overnight remaining copies. (Phoned/Faxed/Served Csl) [99-99015] (pi)

7/20/05 RECEIVED remaining copies of Aplt's Reply Brief (15 copies), per 7/18/05 Order. (Casefiles) [99-99015] (pi)

8/2/05 CALENDARED: Seattle November 16, 2005 9:00 am Courtroom @ Park Place, 21st Floor ** moved to TUE Nov 15 2005 *** [99-99015] (mw)

8/19/05 Filed order (Deputy Clerk: pi) Oral argument on the merits will be held on Wednesday, Nov. 16, 2005, at 9:00 a.m., in the 21st Floor Ctrm at Park Place Building, 1200 Sixth Avenue, in Seattle, Washington. Each side will be (30) minutes to present thier arguments. (Phoned, Faxed & Served Csl) [99-99015] (pi)

10/6/05 CJA travel authorization sent (Authorization # 9CJA99-990151105) to Andrew H. Parnes for Appellant Mark Henry Lankford . [99-99015] (ay)

10/24/05 Filed order (Deputy Clerk: pi)Oral argument is rescheduled to Tuesday, November 15, 2005, at 9:00 am, in the 21st Floor Courtroom of the Park Place Building, 1200 Sith Avenue, in Seattle, Washington. (Phone/Faxed Csl) [99-99015] (pi)

11/15/05 ARGUED TO Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE; SUBMISSION DEFERRED. [99-99015] (sb)

11/25/05 Filed Appellee Arvon J. Arave and Appellant Mark Henry Lankford's joint response to this court's question raised at oral argument on 11/15/05 Re: consideration on mediation with the assistance of the court; served on 11/21/05. (faxed to panel and served to mediation office) [99-99015] (eu)

11/28/05 GTA bill reconciled (Paid) for Andrew H. Parnes for Appellant Mark Henry Lankford . Authorization #: 9CJA99-990151105 [99-99015] (ay)

12/1/05 CJA 21 travel voucher processed. (CJA 21 #: 102005) for Andrew H. Parnes for Appellant Mark Henry Lankford . [99-99015] (mv)

12/2/05 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): This case is referred to the Settlement Unit to explore a possible resolution through mediation. Submission of this appeal has been deferred pending further order of this court. *(Phone/Fax Csl and Served Mediation)* [99-99015] (pi)

12/7/05 Filed order CONFATT (EM) This case under consideration for inclusion in the Mediation Program. See FRAP 33 and Nicnth Circ. Rule 33-1. A settlement assessment confernece will be held by telephone on 12/8/05 at 4:00 p.m. Pacific (SF)Time. A Circuit Mediator will initiate the telephone call and contact each participant at the telephone number listed on the attached list. Check the information for completeness and accuracy. Questions or comments about the conference date or participants should be directed to the Mediation Assistant via fax at 415-556-9725. Procedures governing the assessment conference and the Mediation Program are discussed in the attached memorandum..... (See order for full text)(Faxed/Served/Phoned Csl) [99-99015] (pi)

1/3/06 Filed order CONFATT (DEL) Case referred to Confatt for assessment conference only. Conference to be on 1/26/06 at 10:00 . By telephone (y/n): n . [99-99015] (pi)

1/19/06 Filed order CONFATT (DEL)The mediation previously set for January 26, 2006, is rescheduled to February 9, 2006, at 10:00 am., at the U.S. District Court, 550 West Fort Street, Boise, Idaho. Mediation statements shall be submitted to the Chief Circuit Mediator (fax no. 415-556-9725) on or before February 3, 2006. Except for these date changes, all provisisions of the court's order of January 3, 2006, shall apply. (Served to Csl) B [99-99015] (pi)

2/15/06 Filed order CONFATT (DEL) This cse is released from the Mediation Program. All further inquiries regarding this appeal should be directed to the Clerk's Office. (Served to Csl and Panel) [99-99015] (pi)

11/7/06 Case resubmitted on this date to Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE. (See previous deferral of submission.) Order filed: 11/7/06. [99-99015] (pi)

11/7/06 FILED OPINION: REVERSED & REMANDED (Terminated on the Merits after Oral Hearing; Reversed & Remanded; Written, Signed, Published. Stephen R. REINHARDT; William A. FLETCHER; S. BYBEE, author.) FILED AND ENTERED JUDGMENT. [99-99015] (pi)

11/14/06 Filed Respondent's Motion for Extension of Time to 12/19/06 to File Petition For Rehearing/ Rehearing En Banc w/ attached affidavit in Support of Motion; Served 11/13/06. (Faxed/Served to Panel) (pi)

11/28/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent-Aplt's motion for an extension

of time until December 19, 2006, to file a petition for rehearing and petition for rehearing en banc is hereby GRANTED. (Phoned/Faxed/Served Csl) [99-99015] (pi)

12/12/06 Filed Aple's Motion for Extension of time to 01/2/07 to File Petition for Rehearing w/ Rehearing En Banc; Served on 12/11/06. (Faxed/Served to Panel) (pi)

12/18/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent-Aple's motion for an extension of time until 01/02/07, to file a petition for rehearing and petition for rehearing en banc is hereby GRANTED. (Faxed/Phoned Csl) [99-99015] (pi)

12/22/06 Filed Respondent-Aple's Motion for Extension of Time to 01/03/07 to File Petition for Rehearing w/Rehearing En Banc; Served on 12/21/06. (Faxed to Panel) (pi)

12/29/06 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE,): granting appellee's motion to extend time to file a petition for rehearing for one day. PHONED attorneys 4:00pm [6044471-1] [99-99015] (gar)

1/3/07 Filed original and 50 copies of Aple's Petition for Rehearing and Rehearing En Banc of 21 pages or 4,197 words; Served on 01/02/07. (Panel and All Active Judges) (pi)

1/29/07 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): The panel judges have voted to deny aple's petition for rehearing and petition for rehearing en banc. The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. FRAP 35. Aple's petition for rehearing and petition for rehearing en banc, filed January 3, 2007 is DENIED. (Faxed/Served Csl) [99-99015] (pi)

2/5/07 Filed Faxed Copy of Respondent's Motion for Order Staying Issuance of the Mandate pending filing of Petition for Writ of Certiorari w/ USSC; Served on 2/5/07; (Orig. to Follow by mail)[Faxed to Panel]. [99-99015] [6082028] (pi)

2/6/07 Filed order (Stephen R. REINHARDT, William A. FLETCHER, Jay S. BYBEE): Respondent's motion for stay the issuance of the mandate pending the filing of a petition for a writ of certiorari in the U.S. Supreme Court is GRANTED. (Phoned/Faxed/Served Csl) [99-99015] (pi)

99-99015 Lankford v. Arave

4/19/07 Received letter from the Supreme Court dated 4/11/07 notifying this court that filing of petition for writ of certiorari has been extended to June 14, 2007. (Panel) . [99-99015] (pi)

6/5/07 Received letter from the Supreme Court dated 5/31/07 in Application No. 06A962 re: The application for an extension of time within to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Kennedy, who on 5/31/07 extended the time to and including 6/28/07. (CASEFILES) [99-99015] (eu)

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NO. 99-99015

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MARK HENRY LANKFORD,

Petitioner-Appellant,

v.

A.J. ARAVE, Warden, Idaho State
Correctional Institution,

Respondent-Appellee.

Appeal From the United States District Court
In the District of Idaho,
The Honorable William Fremming Nielsen, Presiding

RESPONDENT-APPELLEE'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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STATEMENT OF COUNSEL

By finding Mark Lankford ("Lankford") met his burden of establishing deficient performance and prejudice, the panel's decision conflicts with Strickland v. Washington, 466 U.S. 668 (1984), and its Supreme Court and Ninth Circuit progeny.

The panel concluded Gregory FitzMaurice's representation was deficient because "there was no reasonable tactical advantage in requiring an erroneous jury instruction that would allow the jury to give greater weight to Bryan's testimony." Lankford v. Arave, 468 F.3d 578, 584 (9th Cir. 2006). (Appendix D). The panel's finding of deficient performance ignores the **presumption** that counsel's conduct was sound trial strategy and improperly shifts the burden to the state to establish FitzMaurice's submission of instruction 15 was a matter of strategy.

The panel also concluded there was prejudice because, "Although there is overwhelming evidence that one or both of the Lankford brothers killed the Bravences, only Bryan's testimony singled out Mark as the killer." Id. at 586 (emphasis omitted). However, because Lankford was charged with felony-murder, it was not necessary for the state to provide corroborative evidence that he committed the murders, only corroborative evidence of the underlying felony – robbery – which the state provided.

ISSUES

Because he failed to overcome the presumption that FitzMaurice's decision to submit instruction 15 might be considered a sound trial strategy, has Lankford failed to establish deficient performance?

Alternatively,

Because the state provided corroborative evidence that connected or tended to connect Lankford to the robbery, has he failed to establish prejudice?

STATEMENT OF THE CASE

The Idaho Supreme Court detailed the facts surrounding the first-degree murders of retired Marine officer Robert Bravence and his wife, Cheryl. State v. Lankford, 781 P.2d 197, 201 (Idaho 1989) (Appendix A). Lankford was charged with two counts of felony-murder stemming from injuries inflicted during the course of a robbery perpetrated by Lankford and his brother, Bryan Lankford ("Bryan"). (Appendix B.)

FitzMaurice was appointed to represent Lankford. In preparation for trial, FitzMaurice conducted extensive research regarding jury instructions, traveling to the University of Idaho law school library. (Tr., pp.50-51.)[1] Because there were no pattern criminal jury instructions, it was FitzMaurice's practice to use California and federal patterned instructions and, after reviewing Idaho law, draft instructions complying with Idaho law. (Tr., p.120.) Because he had access to the archives at the University, FitzMaurice also relied upon instructions from other Idaho cases contained in the clerks' records. (Tr., pp.120-21.) As a result of his research, FitzMaurice requested three instructions regarding accomplice testimony,

[1] The following references are used in this brief: "Tr." refers to the federal evidentiary hearing transcript; "E.R." refers to Lankford's Excerpts of Record; "S.S.E.R." refers to the state's Second Excerpt of Record.

which were given by the trial court. Proposed instruction 16, given as instruction 15 (E.R., p.394), states:

> An accomplice is one who united with another person in the commission of a crime, voluntarily and with common intent. An accomplice does not become incompetent as a witness because of participation in the crime charged. On the contrary, the testimony of one who asserts by his testimony that he is an accomplice, may be received in evidence and considered by the jury, even though not corroborated by other evidence, and given such weight as the jury feels it should have. The jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care.
>
> You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt.

Proposed instruction 19, given as instruction 18 (E.R., p.397), states:

> You are instructed that a defendant cannot be found guilty based upon the testimony of an accomplice unless such testimony is corroborated by other evidence which tends to connect such defendant with the commission of the offense.

Proposed instruction 20, given as instruction 19 (E.R., p.398), states:

> To corroborate the testimony of an accomplice there must be evidence of some act or fact related to the offense which, if believed, by itself and without any aid, interpretation or direction from the testimony of the accomplice, tends to connect the defendant with the commission of the offense charged.
>
> However, it is not necessary that the evidence of corroboration be sufficient in itself to establish every element of the offense charged, or that it corroborate every fact to which the accomplice testifies.

> In determining whether an accomplice has been corroborated, you must first assume the testimony of the accomplice has been removed from the case. You must then determine whether there is any remaining evidence which tends to connect the defendant with the commission of the offense.
>
> If there is not such independent evidence which tends to connect defendant with the commission of the offense, the testimony of the accomplice is not corroborated.
>
> If there is such independent evidence which you believe, then the testimony of the accomplice is corroborated.

Instructions 18 and 19 are correct statements of Idaho law, while portions of instruction fifteen contradict I.C. § 19-2117, which reads as follows:

> A conviction cannot be had on the testimony of an accomplice, unless he is corroborated by other evidence, which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient, if it merely shows the commission of the offense, or the circumstances thereof.

Bryan, whose trial was completed prior to the start of Lankford's trial (E.R., p.257), testified against Lankford (E.R., pp.154-355; S.S.E.R., pp.688(a)-(d)). Lankford was found guilty of both counts of first-degree murder (S.S.E.R., pp.830-31) and sentenced to death (E.R., pp.474-81). Lankford was denied post-conviction relief by the trial court (E.R., pp. 942-

49). The Idaho Supreme Court affirmed Lankford's conviction, sentence and denial of post-conviction relief. Lankford, 781 P.2d 197.

Lankford filed a federal habeas petition. Initially, the district court dismissed Lankford's ineffective assistance of counsel claims based upon procedural default because they were improperly presented to the Idaho Supreme Court. (E.R., pp.1639-64.) However, pursuant to the parties' stipulation, based on Hoffman v. Arave, 236 F.2d 523, (9th Cir. 2001), this Court remanded Lankford's case. (S.E.R., pp.923-24.) An evidentiary hearing was conducted on Lankford's ineffective assistance of counsel claims, including his claim that FitzMaurice was ineffective by submitting instruction 15. Addressing this claim, the district court concluded FitzMaurice's performance was deficient, but determined Lankford failed to establish prejudice. (E.R., pp.1857-62.)

On November 7, 2006, addressing only Lankford's claim regarding jury instruction 15, the panel reversed with instructions to grant the writ and retry Lankford "within a reasonable time or release him." Lankford, 468 F.3d 578.

ARGUMENT

A. To Establish Deficient Performance, Lankford Has The Burden Of Overcoming The Presumption That FitzMaurice's Decision To Submit Instruction 15 Was Not Tactical

For Lankford to establish ineffective assistance of counsel, he has the burden of proving the two-prong test of Strickland, 466 U.S. at 687, deficient performance and prejudice. In Strickland, the Supreme Court repeatedly emphasized the "presumption" that counsel's representation is constitutionally adequate. The Court explained that "specific guidelines are not appropriate" when determining whether "counsel's representation fell below an objective standard of reasonableness" because the Sixth Amendment "relies instead on the legal profession's maintenance of standards sufficient to justify the law's **presumption** that counsel will fulfill the role in the adversary process that the Amendment envisions." Id. at 688 (emphasis added). Because "[i]t is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence," "[j]udicial scrutiny of counsel's performance must be highly deferential." Id. at 689. "Because of the difficulties inherent in making the evaluation, a court must indulge a **strong presumption** that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the **defendant must overcome the presumption** that, under the circumstances, the

challenged action '**might be** considered sound trial strategy.'" Id. (quoting Michel v. Louisiana, 350 U.S. 91, 101 (1955)) (emphasis added). Finally, the Court explained, that in making a deficient performance determination, not only must the courts remember counsel's function "is to make the adversarial testing process work in the particular case . . . , the court should recognize that counsel is **strongly presumed** to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." Id. (emphasis added).

The Strickland presumption of reasonableness has been repeatedly emphasized by the Supreme Court, most recently in Bell v. Cone, 535 U.S. 685, 698 (2002) ("even when a court is presented with an ineffective-assistance claim not subject to § 2254(d)(1) deference a defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy") (internal quotes and citations omitted).

Likewise, this Court has recognized "there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action **might be** considered sound trial strategy.'" Fields v. Woodford, 309 F.3d 1095, 1107 (9th Cir. 2002), as

further amended, 315 F.3d 1062 (9th Cir. 2002) (emphasis added); *see also* Hovey v. Ayers, 458 F.3d 892, 904 (9th Cir. 2006); United States v. Fredman, 390 F.3d 1155, 1156 (9th Cir. 2004); Brodit v. Cambra, 350 F.3d 985, 992 (9th Cir. 2003).

To overcome the presumption that FitzMaurice's decision to submit instruction 15 after conducting extensive research regarding jury instructions was not tactical, the panel concluded, "FitzMaurice simply overlooked important differences between Idaho law and federal law. It was a young lawyer's mistake, akin to failing to check the pocket part, but it was a mistake, plainly enough." Lankford, 468 F.3d at 585. However, at the evidentiary hearing when asked whether he was familiar with I.C. § 19-2117 when he submitted instruction 15, FitzMaurice stated, "I must have since I cited that particular section." (Tr., p.53.) Based upon his research and investigation, FitzMaurice also believed sufficient corroboration existed to meet the requirements of I.C. § 19-2117. (Tr., p.53.) FitzMaurice's decision to submit instruction 15 was not based upon differences between Idaho and federal law but a tactical decision "to forego one defense in favor of another," United States v. Span, 75 F.3d 1383, 1390 (9th Cir. 1996), focusing the entire defense upon the inconsistencies and contractions in Bryan's testimony and prior statements. Admittedly, after more than twenty years

from the time he submitted instruction 15 until he testified, FitzMaurice was unwilling to "confirm the theory," Lankford, 468 F.3d at 584 n.2, but conceded, "That appears to be a plausible reason." (Tr., p.123.)

FitzMaurice's closing argument confirms it was more than a "plausible reason," but the only logical explanation for the instruction's submission.[2] FitzMaurice expressly asked the jury to read instruction 15 "that tells you with reference how to judge a person of this character. How to judge an accomplice in a crime. You're supposed to judge it with caution and due care." (S.S.E.R., p.805.) FitzMaurice dissected Bryan's testimony, repeatedly explaining why he was not a credible witness, beginning with his conviction for robbery in Texas, his demeanor while testifying, his motive for testifying, whether his "story" was a "factual impossibility" and the "multiple stories" he told at various times after the robbery and murders. (S.S.E.R., pp.1583-99.)

Based upon his closing argument, merely because FitzMaurice was unable or unwilling, after twenty years, to confirm that his submission of instruction 15 was tactical does not result in Lankford overcoming the "presumption that, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689, (quoting Michel, 350 U.S. at 101).

[2] FitzMaurice's closing argument is attached as Appendix C.

Undoubtedly, it is because of the passage of time and unwillingness of defense attorneys to concede their actions constitute strategic decisions that the Supreme Court has imposed a "strong presumption that counsel's conduct falls within the wide range of professional assistance." Id.

Further, the panel's conclusion that a simple reasonable doubt instruction "could have served the same purpose without eliminating the corroboration requirement," Lankford, 468 F.3d at 584 n.2, eliminates FitzMaurice's ability to focus his closing argument and defense upon Bryan's credibility. A general reasonable doubt instruction would not have included the following language from instruction 15: (1) "the jury, however, should keep in mind that such testimony is always to be received with caution and considered with great care;" or (2) "You should never convict a defendant upon the unsupported testimony of an alleged accomplice, unless you believe that unsupported testimony beyond a reasonable doubt." (E.R., p.394.)

Because FitzMaurice's investigation and research regarding jury instructions was reasonable, Lankford has failed to overcome the presumption that FitzMaurice's request fell within the wide range of reasonable professional assistance.

B. Because There Was Corroboration Of His Involvement In The Robbery, Lankford Has Failed To Establish The Outcome Of His Trial Would Have Been Different

In addition to deficient performance, Lankford has the burden of establishing prejudice, requiring that he demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694. "In making this determination, a court hearing an effectiveness claim must consider the totality of the evidence before the judge or jury." Id. at 695.

In determining Lankford established prejudice, the panel reviewed Idaho law regarding corroboration and concluded, "The only physical evidence presented at trial was circumstantial, and all of that evidence also linked Bryan to the murders. The only evidence tending to show that **Mark was the killer** was his brother's word." Lankford, 468 F.3d at 589 (emphasis added). However, because Lankford was charged with felony-murder and not premeditated murder, Idaho law did not mandate "evidence tending to show that Mark was the killer," but only that he was "connected with the commission of the [robbery]." State v Scroggins, 716 P.2d 1152, 1158 (Idaho 1986).

As explained by the Idaho Supreme Court, "the proof of a murder in the first degree is established in all of its elements by proving (a) the

unlawful killing of a human being (b) in the course of a robbery. The requirement of 'malice aforethought' is satisfied by the fact the killing was committed in the perpetration of a robbery." Lankford, 781 P.2d at 203; *see also* Scroggins, 716 P.2d at 1158 ("In a prosecution for felony-murder, the state is relieved of the burden of proving that a defendant had the specific intent to kill and instead need only prove that all individuals charged as principals had the specific intent to commit the predicate felony"). These principles were provided to the jury. (E.R., p.402.) The jury was further instructed, "it is therefore not necessary that the State prove that this defendant actually committed the act which caused the death of the victims, provided the State prove beyond a reasonable doubt that the defendant was present, and that he aided and abetted in the commission of the crime of robbery as alleged, or that if he was not present, that he advised and encouraged the commission of such crime." (E.R., p.412.) Finally, the jury was instructed as follows:

> If a human being is killed by any one of several persons engaged in the perpetration of the crime of robbery, all persons who either directly and actively commit the act constituting robbery or who with knowledge of the unlawful purpose of the perpetration of the crime aid and abet in its commission, are guilty of murder of the first degree, whether the killing is intentional or unintentional.
>
> Thus, if two or more persons acting together are perpetrating a robbery and one of them, in the course of the

> robbery and in furtherance of the common purpose to commit the robbery, kill a human being, both the person who committed the killing and the person who aided and abetted him in the robbery are guilty of Murder of the First Degree.
>
> A killing that occurs within the perpetration of a robbery embraces not only the actual acts of the transaction, in this case the robbery, and the circumstances surrounding it, but also those acts immediately following it and so closely connected with it as to form in reality a part of the occurrence.
>
> However, where a robbery has been completed prior to the killing and such time has elapsed as to make the killing not a part of the circumstances of the robbery, then and in that event, the defendant can not be convicted of first degree murder.

(E.R., p.417.)

Idaho's appellate courts have discussed extensively the question of what constitutes sufficient corroboration. In State v. Evans, 631 P.2d 1220, 1222 (Idaho 1981) (quoting State v. Gillum, 228 P. 334, 336 (1924)), the Idaho Supreme Court explained, "[t]he degree of corroboration necessary to comply with the statute:"

> No general rule can be stated with respect to the quantum of evidence corroborating an accomplice's testimony which is necessary to warrant a conviction, each case must be governed by its own circumstances, keeping in view the nature of the crime, the character of the accomplice's testimony, and the general requirement with respect to corroboration. Where the circumstances point to the guilt of the accused, independent of the accomplice's testimony, such circumstantial evidence may be a sufficient corroboration of the accomplice's testimony to sustain a conviction. It is not necessary that the testimony of an accomplice be corroborated in every detail. Any corroborative

> evidence legitimately tending to connect the defendant with the commission of a crime may be sufficient to warrant a conviction, although standing by itself it would not be sufficient proof of defendant's guilt.

In State v. Garcia, 630 P.2d 665, 672 (Idaho 1981) (quoting State v. Bassett, 385 P.2d 246, 248 (1963)) (citations omitted), the Idaho Supreme Court reaffirmed the "applicable standards for determining whether an accomplice's testimony is sufficiently corroborated to satisfy the requirements of I.C. § 19-2117:"

> It is not necessary that there be corroborating evidence concerning every material fact as to which the accomplice testified. The statute permits convictions upon the testimony of an accomplice with the limitation that the accomplice shall be corroborated by such other evidence as tends to connect the defendant with the commission of the crime, and hence the corroboration be independent of the testimony of the accomplice and connect or tend to connect the defendant with the commission of the crime charged. Corroboration of an accomplice need only connect the accused with the crime, it may be slight, and need only go to one material fact. It may be entirely circumstantial. The jurors are the judges of the weight and credibility of the testimony under proper instructions.

Further, "an innocent explanation does not strip the evidence of its corroborative character," State v. Hill, 97 P.2d 1014, 1019 (Idaho Ct. App. 2004), and merely because an accomplice's testimony is vital to the state's case, does not change the level of corroboration required, *see* State v. Jones, 873 P.2d 122, 126 (Idaho 1994) ("Wystrach's testimony was integral to the

prosecution's case, providing first-hand knowledge of the conspiracy, its subject matter and payoffs").

The panel attempted to distinguish Idaho cases based upon whether a trial court refused a corroboration instruction, and concluded, "the Idaho Supreme Court has demanded substantial evidence of corroboration before it will find the error harmless." Lankford, 468 F.3d at 588. This distinction is unavailing. In State v. Gonzales, 438 P.2d 897, 900 (Idaho 1968), the issue before the court was whether the witness was an accomplice. Because the state asserted the witness was not an accomplice, neither the state nor the court raised the question of whether it was harmless error in not instructing the jury under I.C. § 19-2117. The state is unaware of any Idaho case requiring "substantial evidence of corroboration before it will find the error harmless," as opposed to corroborating evidence that merely establishes a connection with the commission of the offense, Garcia, 630 P.2d at 672, which "may be slight, need only go to one material fact and may be entirely circumstantial." State v. Pecor, 972 P.2d 737, 745 (Idaho Ct. App. 1998).

"Keeping in view the nature of the crime," Evans, 631 P.2d at 1222, it is logical to examine Idaho robbery cases to determine whether Bryan's testimony was sufficiently corroborated. In Evans, the testimony of a criminalist who testified only that it was possible two hairs taken from a ski

mask belonged to the defendant, and the testimony of the victim regarding only the robber's eyes and nose, was sufficient evidence to corroborate an accomplice's testimony. 631 P.2d at 1222. In State v. Pierce, 685 P.2d 96, 842 (Idaho 1984), a case similar to Lankford's, the supreme court concluded testimony establishing the defendant was seen with his two accomplices driving the getaway car before the robbery and driving the car more than thirty minutes after the robbery was sufficient to corroborate the testimony of the accomplices.

Based upon Idaho's robbery cases, Bryan's testimony was sufficiently corroborated. As explained in the prosecutor's closing statement (S.S.E.R., pp.783-84, 791-97), there was significant evidence supporting Bryan's testimony, particularly "the time sequence" and Lankford's statements to Roy Ralmuto. On the day of the Bravences' murder, at approximately 10:00 a.m., Art Goodloe saw a man and woman near a greenish Volkswagen van. When Goodloe returned at approximately 3:30-4:00 p.m. he saw the two people and van near Sheep Creek campground. (S.S.E.R., pp.179-84, 187, 190-91.) That same evening at approximatly 6:30 p.m., Darrell Cox picked up Bryan and Lankford who was carrying a shotgun. At Lankford's request, Cox dropped them off at McAllister campground. (S.S.E.R., pp.339-44, 362-77, 381, 389-91.) Chris Damman and his wife Julie corroborated Cox's

testimony, explaining they were at McAllister campground when Cox dropped off the Lankfords at approximately 7:30 p.m. (S.S.E.R., pp.393-408.) The Lankfords "sort of stood around by the car" making Julie "scared" because "[t]hey weren't real clean, and the gun, and the way they stood around, and they had no – there was no other vehicle there. And that sort of – my mom and I sort of wondered why he was letting them off since there was no houses around that area or anything." (S.S.E.R. pp.405-06.) The brothers were there for approximately 15-20 minutes and then went "down towards the river." (S.S.E.R., pp.398-99.).

Ernest Wells and Deputy Jon Stroop detailed the distances between the locations, including McAllister and Sheep Creek campgrounds, Summit Flat where the two bodies were recovered, and the location where the Lankfords concealed the Camaro they had driven from Texas. (S.S.E.R., pp.227-29, 257-65, 284-87.) Lee VonBargen explained it took approximatly two hours to travel from Summit Flat to Grangeville. (S.S.E.R., p.96.) Leo Pils testified regarding the distance and time to drive from Grangeville to Pendleton, Oregon. (S.S.E.R., pp.714-16.) Based upon the time frame, the prosecutor established significant corroboration permitting him to argue, "Now if Mark wasn't there and wasn't involved and Bryan did this all, they would have had to make a reservation to have Mark have Bryan pick Mark

up. I suggest and submit to you . . . that is absolutely unreasonable." (S.S.E.R., p.793.)

Lankford's finger and palm prints taken from various items inside the Bravences' van (S.S.E.R., pp.578-83) further corroborate Bryan's testimony that his brother was involved in the robbery.

Additionally, Ralmuto testified regarding a conversation with Lankford after returned to Texas and noticed a Department of Public Safety Automobile. Lankford said, "We've got to get out of here and get out of here now." (S.S.E.R., p.1196.) When Ralmuto left Lankford at the Trinity River, Lankford came to Ralmuto, shook his hand and said, "I would never see him alive again nor Bryan alive again. And, then, he sort of waited a minute, and he said: Well, you might see Bryan alive again, but I can promise you you won't see me alive again." (S.S.E.R., p.630.) As explained by the prosecutor, "Is that the kind of comment that someone who had only been involved in the use of the credit cards and possession of the stolen property would make? Is that a situation where you'd go back in the brush and spend the rest of your life? I submit not." (S.S.E.R., pp.794-95.)

Finally, Bryan did not commit the robbery and murders alone. Robert, a retired marine, "was physically in very good shape." (S.S.E.R., p.65.) Based upon Bryan's stature, Robert's physical condition and desire to

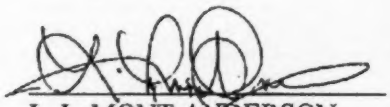
protect his young wife, it is unreasonable to believe Bryan's subsequent stories regarding how he allegedly robbed and murdered the Bravences without his brother's assistance.

As noted in the panel's decision, whether submission of the erroneous instruction was prejudicial is "a harder question" that is "close." Lankford, 468 F.3d at 585, 591. Respectfully, because the panel misapplied Idaho law and overlooked significant corroboration regarding the robbery, the dividing line has moved to the other side. Based upon all the evidence, the state connected or tended to connect Lankford to the robbery. Therefore, because sufficient corroboration was presented to the jury regarding Lankford's involvement in the robbery, if not the murders, he has failed to establish, based upon a reasonable probability, that the outcome of his trial would have been different if FitzMaurice had not submitted the erroneous instruction.

CONCLUSION

The state respectfully requests that rehearing en banc be granted, the panel's decision be vacated and the judgment of the district court be affirmed.

DATED this 2nd day of January, 2007.



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